TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~1030.~~ 631

WILLIAM R. FOSDICK, AND JAMES D. FISH, AND FREDERIC W. HUIDEKOPER, ET AL., APPELLANTS,

vs.

MICHAEL SCHALL, INTERVENOR.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED DECEMBER 31, 1877.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the judges thereof, on Saturday, the sixth day of October, in the year of our Lord one thousand eight hundred and seventy-seven, and of our Independence the one hundred and second year.

WILLIAM H. BRADLEY, *Clerk.*

WILLLIAM R. FOSDICK AND JAMES D. FISH
v.
THE CHICAGO, DANVILLE AND VINCENNES Railroad Company et al. } In chancery.

In the matter of the intervening petition of Michael Schall.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the 20th day of May, A. D. 1877, in
2 the record of the proceedings of said court in said entitled cause, before the Hon. Thomas Drummond, judge, is the following entry, to wit:

WILLIAM R. FOSDICK AND JAMES D. FISH
v.
THE CHICAGO, DANVILLE AND VINCENNES Railroad Company et al. } In chancery.

This cause came on to be heard, and after being argued by counsel, upon consideration by the court, it is ordered, adjudged, and decreed that Adna Anderson be, and he is hereby, appointed receiver herein, to take possession of the money and assets, real and personal, road-bed, road, iron, ties, lands, rights of way, mines, rolling-stock, leases, franchises, and all other rights and property, of whatever nature and kind, of the Chicago, Danville and Vincennes Railroad Company, wherever the same may be found within the State of Illinois, with power to manage, control, and exercise all the franchises and property whatever of the said railroad company within said State, and if need be, under the direction of the court, to sell, transfer, and convey the whole or any part of the property of said railroad company, and with power to prosecute and defend all suits brought by or against the said railroad
3 company, whether heretofore or hereafter commenced, whether in the name of said railroad company or otherwise, to defend all suits brought against him as such receiver or affecting his receivership, and to bring such suits in the name of said railroad company as he may be advised by counsel to be necessary and proper in the discharge of the duties of his office, and for acquiring, securing, and protecting the assets, franchises, property, and rights of the said railroad company.

And it is further ordered that the said defendant, The Chicago, Danville and Vincennes Railroad Company, and every other person or persons who may have or hold any part or portion of the property of said railroad company, by, through, or under the said company, or for its use and benefit, shall assign, transfer, and deliver over to said receiver all property, real, personal, and mixed, of the said railroad company, wheresoever found within the said State of Illinois, and all contracts in which said railroad company is interested, all the books, papers, vouchers, and evidences of indebtedness, moneys and assets of said company, and all

other effects of every kind, name, and nature which belong to said
4 company or are held for its use and benefit, or in which it has any beneficial interest.

It is further ordered, adjudged, and decreed that the said receiver have full power and authority to enquire after, receive, and take possession of all said property, debts, equitable interests, things in action, and other effects, and for that purpose to examine the said defendant, The Chicago, Danville and Vincennes Railroad Company, and the officers of said company, and such other persons as he may deem proper, on oath, before Henry W. Bishop, master in chancery of this court, from time to time, as he may deem necessary.

It is further ordered, adjudged, and decreed that the said receiver keep a full and accurate account of his acts and doings as such receiver, and report the same to this court, from time to time, as he may be hereafter directed by the order of this court. And in the meantime, and until the further order of this court, to run, operate, and manage the said road, and pay the expenses thereof, and to manage and control all said property and affairs of said company.

5 And the said receiver is hereby empowered and authorized to employ such counsel and attorneys as he may deem necessary to manage in his behalf such suits and other affairs as have or may arise, and to advise such receiver in relation to the performance of his duties therein.

It is further ordered, adjudged, and decreed that said receiver may use the moneys of the said defendant, The Chicago, Danville and Vincennes Railroad Company, for any and all of the purposes stated in this order.

It is further ordered, adjudged, and decreed that the said receiver shall, as speedily as possible, examine into the condition of the property and assets of the said road, its contracts, leases, running arrangements, its business and affairs, and take an inventory of its moveable property, and make a schedule of its floating indebtedness for labor and supplies, and report the same to this court as soon as may be, with his recommendation as to the proper disposition of the same and payment thereof.

It is further ordered, adjudged, and decreed that the said receiver, before entering upon any of his duties in this behalf, shall enter
6 into bond in the penal sum of one hundred thousand dollars, with security to be approved by Henry W. Bishop, master in chancery of this court, conditioned for the faithful performance of his duties as such receiver, and that he will duly account for and pay over, upon the order of this court, all moneys, properties, and effects which he shall receive by virtue of this order, and which shall remain from the operation and management of the said railroad property.

Afterwards, to wit, on the 14th day of September, A. D. 1875, William R. Fosdick and James D. Fish, by their solicitors, filed in said clerk's office their amended bill of complaint in said entitled cause, which said amended bill is in the words and figures following, to wit:

7 UNITED STATES OF AMERICA,
Northern District of Illinois:

In the circuit court thereof.

WILLLIAM R. FOSDICK AND JAMES D. FISH
vs.
CHICAGO, DANVILLE & VINCENNES RAILroad Company, James W. Elwell, and R. Biddle Roberts. } In chancery.

To the judges of said court, in chancery sitting:

William R. Fosdick and James D. Fish, who are each citizens of the State of New York, by leave of court first had and obtained, bring this their amended bill against the Chicago, Danville & Vincennes Railroad Company, James W. Elwell, and R. Biddle Roberts.

And thereupon your orators complain and say that the said railroad company was organized as a corporation under and by virtue of the laws of the State of Illinois, during the year A. D. 1865, and from thence hitherto has been and still is such corporation, and a citizen of the State of Illinois; that the said James W. Elwell is a citizen of the State of New York, and said R. Biddle Roberts is a citizen of the State of Illinois.

Complainants further allege that the said railroad company was organized under an act of the general assembly of the State of Illinois, entitled "An act to incorporate the Chicago, Danville & Vincennes Railroad Company," approved February 16th, A. D. 1865, and from thence hitherto has been engaged in business, under and by virtue of the said act, at and within the northern district of Illinois; that said corporation was by its said charter, among other things, authorized and empowered to locate, construct, build, maintain, and operate a railroad, with single or double tracks, from a point in Lawrence County, on Wabash River, opposite Vincennes, in the State of Indiana, upon the
8 most eligible route to and into the city of Chicago, by way of Paris, in Edgar County, to Danville, in Vermillion County, and to lay out and locate their said road one hundred (100) feet in width through the whole length thereof; also to unite and consolidate its said railroad, stock, and property with that of any other railroad company or companies, within this or any other State, whose line or lines of road should cross or intersect the railroad authorized by said charter, or be built along or upon the line thereof, upon such terms as should be mutually agreed upon between said company and such other company, and to execute such contracts as should secure the object of such consolidation.

Complainants further allege that in and by said charter said railroad company was authorized to borrow money on the credit of said company, not exceeding its authorized capital stock, at a rate of interest not exceeding ten per cent. per annum, payable semi-annually, and to execute bonds therefor with interest coupons annexed, and to secure the payment of the same by mortgage or deed of trust upon the whole or any part of the said railroad and the income of the company then existing or thereafter to be acquired.

Complainants further allege that in and by said charter the directors of said corporation were authorized to negotiate and sell the bonds of

said company upon such terms and in such places, either within or without the State of Illinois, and at such rates and for such prices as in their opinion should best advance the interests of said company.

Complainants further allege that thereafter, and prior to the 10th day of March, 1869, the capital stock of said corporation was the sum of two million five hundred thousand dollars ($2,500,000); and that thereafter, and on the 10th day of March, A. D. 1869, the said corporation, for the purpose of constructing and putting in operation said line of railroad, caused to be executed, under the hand of its president and its corporate seal, twenty-five hundred bonds (2,500), numbered from one (1) to twenty-five hundred (2,500), inclusive, each for the sum of one thousand dollars ($1,000), payable in gold coin on the 1st day of April, in the year 1909, with interest at the rate of seven (7) per cent. per annum in gold coin, payable semi-annually, on the first days of April and October in each year, on delivery of said coupons, in the city of New York, at such place as should be designated by the company. A copy of one of said bonds and one of the interest coupons thereto annexed is attached to the original bill, and marked "Exhibit A"; and complainants refer to the said exhibit and make it a part of this their amended bill.

Your orators further show to your honors that for the purpose of securing the final payment of the said issue of twenty-five hundred bonds (2,500) with all the interest coupons thereto annexed, said corporation executed and delivered to the complainants, William R.
9 Fosdick and James D. Fish, as trustees, a mortgage or deed of trust, conveying to them for the benefit of every holder of said bonds, or any of them, all the railroad of said company extending from Chicago, in Cook County, in the State of Illinois, southeasterly through the counties of Cook, Will, Kankakee, Iroquois, and Vermillion, to the city of Danville, and thence southeasterly to a point on the State line of Indiana, and all its franchises, equipments, property, tolls, rents, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods, and chattels connected with or used in the using or operating of said railroad or appertaining thereto, and all its rails, ties, fuel, fencing, and erections, and all its rights of way and easements, and all cars, engines, and tools, and all rents, reservations, and reversions of every nature and kind whatever, including all the property between said terminal points, which said railroad company then had, owned, or possessed, or might thereafter acquire, either in law or equity, of every kind whatever appertaining thereto; a copy of which said mortgage is attached to the original bill in this cause, marked as "Exhibit B" thereof; to which said copy complainants refer, and make the same a part hereof.

Your orators further allege that said trust deed was duly executed under the hands of the president and secretary of said company, and under its corporate seal, and was on the 10th day of March, A. D. 1869, delivered to said trustees, who then and there accepted the trust thereby created and entered upon the performance of their duties as such trustees.

Your orators further allege that said trust deed, so executed and delivered to them as aforesaid, was thereafter, to wit, during the month of March, 1869, duly recorded in each of the counties of Cook, Will, Kankakee, Iroquois, and Vermillion, in the State of Illinois, and then and there became and was a first lien upon all of the franchises and property of every kind, name, and nature whatever belonging to the said railroad company, or thereafter acquired by it within the said

counties, and all the line of railroad then built or thereafter to be built by the said company, within the said counties, between the city of Chicago, in the county of Cook, and Danville, in the county of Vermillion.

Your orators further allege that all of the said twenty-five hundred (2,500) bonds were certified by them as such trustees, and were thereafter sold and disposed of by the said corporation, and that all of said twenty-five hundred (2,500) bonds are now outstanding, and a valid and legal claim against the said corporation, and that the said trust deed securing the same is now a valid and subsisting first lien upon all of the property and franchises of the said company, within the counties aforesaid.

Your orators further allege that thereafter, and on the 4th day of March, A. D. 1872, the said Chicago, Danville & Vincennes Railroad Company entered into articles of consolidation with the Rossville & Indiana Railroad Company, under and by virtue of which the said two corporations became and were a consolidated corporation by the name and style of the Chicago, Danville & Vincennes Railroad Company; a copy of the said articles of consolidation is attached to the original bill in this cause, as Exhibit C thereof, and is hereby referred to and made a part of this amended bill.

Your orators further show unto your honors that thereafter, and on the 9th day of March, A. D. 1872, said Chicago, Danville & Vincennes Railroad Company entered into certain articles of consolidation with the Western Indiana Railroad Company, under and by virtue of which the said two corporations became and were a consolidated corporation by the name and style of the Chicago, Danville & Vincennes Railroad Company; a copy of the said articles is attached to the original bill in this cause, as Exhibit D thereof, and is herein referred to and made a part of this bill.

Your orators further show to your honors that the said Western Indiana Railroad Company was, prior to the said last-mentioned consolidation, a corporation organized under the general laws of the State of Indiana; and that the said Chicago, Danville & Vincennes Railroad Company, by virtue of the said last-mentioned consolidation, became and was a corporation of the State of Indiana, as well as a corporation of the State of Illinois; and as such corporation in the State of Indiana became and was vested with the lawful power under the laws of said State to locate, construct, and operate a continuous line of railway, extending from the boundary between the States of Indiana and Illinois at a point in Warren County, southwardly, through the counties of Warren, Fountain, Park, and Clay, to the town of Brazil, in said Clay County, in the State of Indiana.

Your orators further show to your honors that thereafter, and on the 12th day of March, A. D. 1872, the said Chicago, Danville & Vincennes Railroad Company, for the purpose of aiding and providing the means required for the construction and equipment of the division of the road of said company lying and being in the State of Indiana, caused to be executed its bonds, amounting to one million five hundred thousand dollars ($1,500,000), being fifteen hundred (1,500) bonds of one thousand dollars ($1,000) each, payable forty (40) years after date, with interest at the rate of seven per cent. per annum, payable on the first days of April and October of each year, both principal and interest payable in American gold coin; which said last-mentioned bonds were numbered from 2,501 to 4,000 inclusive, and had attached thereto interest coupons; which said bonds and coupons were of the same form as the twenty-five hundred (2,500) bonds hereinbefore mentioned and described.

Your orators further show to your honors that for the purpose of securing the payment of the said bonds and coupons thereto annexed, in accordance with the tenor and effect thereof, the said railroad company, on the said 12th day of March, A. D. 1872, executed and
11 delivered to your orators, William R. Fosdick and James D. Fish, its certain mortgage or trust deed, in and by which the said railroad company conveyed to the said trustees the entire division of the railroad of the party of the first part, situated, lying, and being in the State of Indiana, commencing on the boundary line between the States of Illinois and Indiana, in the township of Marshfield and county of Warren, in the State of Indiana, at the point where it connects with the road of the said railroad company, terminating on the eastern boundary line of the State of Illinois, in the town of Ross, in Vermillion County, in said State of Illinois, and distant about ten miles southeasterly from the village of Rossville, and extending thence in a southeasterly direction to Covington, in Fountain County; thence southerly to Montezuma, in Park County; thence southeasterly to Brazil, in Clay County, on the line of the Terre Haute and Indianapolis Railroad; also a branch road, extending from the main line before described, commencing at a point on said main line distant about three miles south from Covington, in Fountain County, and extending in an easterly direction to the village of Newburg, in said county; the entire length of road being about eighty (80) miles; and also all such additional branch roads as said railroad company should thereafter construct for the purpose of extending its track into the coal and mining regions in the vicinity of said main line road; with all its franchises, equipments, property, tolls, issues and profits, and all its lands, tenements, buildings, fixtures, machinery, goods, and chattels connected with or used in the using or operating the said railroad, or appertaining thereto, and all its rails, ties, fuel, fencing and erections, and all its rights of way and easements, and all cars, engines, and tools, and all rents, reservations, and reversions of every nature and kind whatever, including all the property between said terminal points which said railroad company then had, owned, and possessed, or might thereafter acquire, either in law or equity, of every kind whatever, appertaining thereto; a copy of the said mortgage is hereto attached, marked "Exhibit F," and made a part of this amended bill.

Your orators further show to your honors that the said mortgage, so executed as aforesaid, was thereafter, to wit, on the said 12th day of March, A. D. 1872, delivered to your orators, as trustees; they then and there accepted the trust thereby created, and entered upon the performance of their duties as said trustees; and thereafter, to wit, on the day and year aforesaid, as such trustees, they duly certified all of the said fifteen hundred bonds, and a large portion thereof were thereafter sold by the said company; and the remainder thereof, as these complainants are advised and believe, were hypothecated by the said company as collateral to certain indebtedness thereof; and all of the said fifteen hundred (1,500) bonds are now outstanding and valid obligations of the railroad company.

12 Your orators further allege that the said mortgage was thereafter, to wit, during the said month of March, A. D. 1872, duly recorded in each of the counties of Warren, Fountain, Park, and Clay, in the State of Indiana, and then and there became, and was, a first lien upon all the property and franchises of the said railroad company within the said counties in said State of Indiana.

Your orators further show unto your honors that the said Chicago,

Danville & Vincennes Railroad Company thereafter, and on the 24th day of April, A. D. 1872, for the purpose of further securing the prompt payment of all of the said two issues of bonds, in all amounting to four thousand bonds (4,000), and the coupons thereto annexed, executed and delivered unto your orators, as trustees, a certain mortgage, or deed of trust, in and by which they then and there conveyed to your orators, as such trustees, all of the said line of railroad then built, or thereafter to be built, in the State of Indiana, together with the franchises, appurtenances, equipments, property, tolls, issues, and profits thereof, as additional security for the payment of said bonds, numbered from one (1) to twenty-five hundred (2,500), both inclusive, together with the coupons thereto annexed; and in and by said mortgage the said company also conveyed to your orators, as trustees, the entire railroad of the said company, lying, being, and extending from its terminus, in the city of Chicago, in Cook County, Illinois, southerly, through the counties of Cook, Will, Kankakee, Iroquois, and Vermillion, to the city of Danville, being in length about one hundred and thirty miles (130), and all its franchises, equipments, property, tolls, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods, and chattels, and all its rails, ties, fuel, fences, and erections, and all its rights of way and easements, and all cars, engines, and tools, and all rents, reservations, and reversions, of every nature and kind whatever, including all the property between said terminal points which said railroad company then had or should thereafter acquire, as additional security for the payment of said bonds numbered from 2,501 to 4,000, inclusive, together with the coupons thereto attached.

Your orators further show to your honors that the said last-mentioned mortgage was thereafter, to wit, on the 24th day of April, 1872, delivered to your orators as trustees; they then and there accepted the same as additional security for the payment of the said bonds in manner and form as aforesaid; and they allege that, under and by virtue of the terms and conditions of the said mortgage, the said bonds, numbered from one (1) to twenty-five hundred (2,500), inclusive, became, and were, a second lien upon all of the Indiana division of the said railroad then in course of construction and thereafter to be constructed, together with all of the franchises, equipments, and appurtenances thereof; and that the said bonds, numbered from twenty-five hundred and one (2,501) to four thousand (4,000), inclusive, became, and were, a second lien upon
13 all of the Illinois division of the said railroad, together with the franchises, equipments, and appurtenances thereof, as by the said mortgage, a copy of which is hereto attached, marked "Exhibit G," and made a part hereof, will more fully and at large appear.

Your orators further show unto your honors that thereafter, and on the 6th day of May, 1872, the said Chicago, Danville & Vincennes Railroad Company entered into certain articles of consolidation with the Attica & Terre Haute Railroad Company, under and by virtue of which the said two corporations became a consolidated corporation by the name and style of the Chicago, Danville & Vincennes Railroad Company, a copy of which articles of consolidation is attached to the original bill in this cause as Exhibit E thereof, and are hereby referred to and made a part of this amended bill.

And your orators further allege that the said railroad company proceeded with the construction of its line of railroad in the States of Indiana and Illinois, and have constructed and put in operation a large portion of the line thereof, and that the said line, as now constructed and operated within the State of Illinois, commences at Dalton, about

twenty (20) miles south of the city of Chicago, and runs thence southerly to Danville, in Vermillion County, a distance of one hundred and eight (108) miles, with a branch from Bismark, in Vermillion County, to the east line of the State of Illinois, a distance of about seven (7) miles, in all a distance within said State of about one hundred and fifteen (115) miles.

Your orators further allege that said railroad company runs its cars from near Dalton into the city of Chicago, over the line of the Chicago & Southern Railway, a distance of about twenty-one (21) miles; that it also uses a portion of the line of the Pittsburg, Cincinnati & St Louis Railway, within and near the city of Chicago; and within said city the said company uses and maintains side-tracks and appurtenances of its own.

Your orators further allege that, within the State of Indiana, the said company has constructed its line of railroad from the State line, between the States of Indiana and Illinois, at a point where the Bismark branch of the Illinois division intersects the line between the States of Indiana and Illinois, to Snoddy's Mills, a distance of eighteen (18) miles between said points, and has constructed various branches to coal mines, in all about five (5) miles. From Snoddy's Mills to Montezuma, a distance of about eighteen (18) miles, your orators are informed and believe, and charge the fact to be, that the said company has procured the right of way and has finished about twenty (20) per cent. of the grading; from Montezuma to Brazil coal-field, a distance of twenty-five (25) miles, your orators are informed and believe, and, therefore, charge, that said company has procured the right of way and finished about eighty-five (85) per cent. of the grading, and all of the bridging, and has laid about two miles of the track, the total length of line from the State line to the Brazil coal-fields being about sixty-one (61) miles; that the
14 said portion of said road within the State of Indiana is known as the Indiana division thereof, and the portion within the State of Illinois as the Illinois division thereof.

Your orators further allege that said railroad company has paid all of the coupons maturing upon said Illinois division bonds, and said Indiana division bonds, up to and including the coupons maturing on the first day of April, 1873, and that none of the coupons maturing since that time, or any part thereof, have ever been paid, but the said company, though often requested, has never paid the same, but so to do has made default.

Your orators further show to your honors that after said railroad company had made default in the payment of the coupons of the said bonds maturing October 1st, 1873, and, to wit, on the 11th day of November, 1873, the said railroad company issued a circular to its bondholders, in and by which it proposed that the holders of bonds should deposit with your orators, William R. Fosdick, as trustee, the coupons due October 1st, 1873, April 1st, 1874, October 1st, 1874, and April 1st, 1875, and receive in exchange therefor the convertible bonds of said railroad company dated January 1st, 1873, payable February 1st, 1893, bearing interest at seven (7) per cent. per annum, with coupons payable the 1st of February and August of each year, principal and interest in gold; said bonds to bear interest from February 1st, 1874, and to be received by the bondholders at seventy-five (75) per cent. of their par value; also scrip certificates bearing interest the same as the bonds, to be issued for fractional sums, and exchangeable for the convertible bonds when presented in sums of five hundred (500) or one thousand (1,000) dollars; the coupons thus deposited in trust were to be held by

the trustee until October 1st, 1876, after which the coupons were to be c nceled by the trustee and surrendered to the company; but in case of non-payment of any coupons becoming due up to October 1st, 1876, the coupons deposited with the trustee were to be surrendered to the original owners upon the return of the second mortgage bonds, or scrip certificates which had been issued for them.

Your orators further allege that, in response to said proposition, coupons to a considerable amount were delivered to said special trustee, and there were issued in lieu thereof forty-four (44) convertible bonds of one thousand (1,000) dollars each, and twenty-eight (28) convertible bonds of twenty-five hundred (2,500) dollars each, and about thirty-five hundred (3,500) dollars of scrip certificates for fractional sums less than five hundred (500) dollars.

Your orators further show to your honors that thereafter, and on or about the 20th of November, 1873, the said railroad company issued to its said bondholders another circular, which proposed the following scheme: That the bondholders should deposit the four coupons, from October 1st, 1873, to April 1st, 1875, inclusive, with your orator, William R. Fosdick, as trustee, and should receive and exchange therefor certificates of indebtedness, payable in five (5) years from February 1st, 1874, with interest payable semi-annually, on the first days of February and August of each year, principal and interest payable in gold, the coupons to be held by the trustee until after the maturity of the certificate of indebtedness, on the 1st of February, 1879, when they were to be canceled by said trustee, and surrendered to the company; but in the case of the non-payment of the interest or the principal of the certificate at maturity, or of the coupons on the first mortgage bonds, between October 1st, 1875, and February 1st, 1879, both inclusive, then the coupons were to be returned to the original owners, upon surrender of the certificates, with all their original rights to proceed against the company unimpaired.

Your orators further allege that the holders of two million eight hundred and one thousand (2,801,000) dollars of the said four thousand (4,000) bonds of one thousand (1,000) each accepted one or the other of the two propositions hereinbefore set forth, and that under the last mentioned proposition there were issued certificates of indebtedness amounting to three hundred and forty-seven thousand nine hundred (347,900) dollars, which said certificates were all of the same form, and your orators hereto attach a blank certificate, with coupons annexed, marked "Exhibit H", and make it a part of this their amended bill.

Your orator further shows unto your honors that the convertible bonds mentioned in said first proposition were part of an issue of bonds of said company to the amount of one million of dollars ($1,000,000), dated January 1st, 1873, due February 1st, 1893, with interest at seven (7) per cent. per annum, payable semi-annually, principal and interest payable in gold coin, which said bonds were secured by a certain deed of trust, dated the 16th day of December, 1872, in and by which the said railroad company conveyed to James D. Fish and James W. Elwell, of the city of New York, as trustees, all of its line of railroad in each of the States of Illinois and Indiana, with all of the franchises, equipments, property, and appurtenances thereof, a copy of which mortgage is hereto attached, marked "Exhibit I," and made a part hereof.

Your orators further aver that the said James D. Fish, named as one of the trustees in the said convertible mortgage, has declined to perform the duties of trustee under said mortgage, and has resigned the said office, and that the said defendant, James W. Elwell, whose appear-

ance has heretofore been entered in this cause, is the sole remaining trustee under the said mortgage.

And your orators allege that the said convertible mortgage is in all respects subject to the three mortgages hereinbefore mentioned and described, to wit, the Illinois division, dated March 10th, 1869, which is a first lien upon all of the Illinois division of the said railroad;
16 the Indiana division mortgage, dated March 12, 1872, which is a first lien upon all of the Indiana division of said road; and the supplemental mortgage, dated April 24, 1872, which is a second lien upon the entire line of said railroad. And your orators aver that the said convertible mortgage is, as they are advised and believe, only a third lien upon said line of railroad in the States of Indiana and Illinois.

Your orators further allege that they are informed and believe that only about one hundred and seventy thousand ($170,000) dollars of the said convertible bonds have been sold by the said railroad company; that about seven hundred and eighty-five thousand ($785,000) dollars of said bonds have been hypothecated as collateral to certain of the floating indebtedness of said company, and that about forty five thousand ($45,000) dollars of said bonds have not been issued at all.

Your orators further show unto your honors that the said railroad company failed to pay all the coupons upon said certificates of indebtedness due February 22d, 1872, and that said company has not paid any of the coupons upon said certificates of indebtedness which fell due on the first day of August, 1875.

Your orators further show to your honors that they are advised and believe that the said railroad company have never paid any of the coupons upon any of the four millions ($4,000,000) of bonds which were not funded as aforesaid, and which matured on and subsequent to October 1st, 1873, and that all of said coupons, to wit, the coupons upon one million one hundred and ninety-nine thousand dollars ($1,199,000) of said bonds have long since become due and remain wholly unpaid and unsatisfied, and that the owners thereof have never in any way consented to the said default.

Your orators further aver that they are informed and believe, and therefore charge the fact to be, that the said railroad company are wholly unable to pay any of said overdue coupons upon the said four thousand (4,000) bonds on the said overdue coupons upon said certificates of indebtedness, or the said coupons upon said convertible bonds which were delivered to coupon holders in lieu of the coupons falling due October 1, 1873, April 1, 1874, October 1, 1874, and April 1st, 1875, but that said company is insolvent, and has a floating indebtedness of about the sum of eight hundred and fifty thousand dollars, which it is wholly unable to pay, a large portion of which floating indebtedness is secured by the hypothecation of the convertible bonds hereinbefore mentioned as collateral thereto, and a portion of which has been prosecuted to judgment and execution.

And your orators further show to your honors that heretofore, and on or about the 12th day of January, A. D. 1875, the said railroad company made a further issue of currency bonds to the amount of one million ($1,000,000) dollars, due January 12, 1877, and to secure the
17 same executed and delivered to the defendant, R. Biddle Roberts, who is a citizen of the State of Illinois, and a resident of the city of Chicago, in said State, a certain instrument in writing commonly called a chattel mortgage, a copy of which, marked "Exhibit K," is hereto attached and made a part of this bill, which said instrument

purporting to convey, assign, and mortgage to the said Roberts divers engines, cars, tools, and machinery, more specifically described and specified in said instrument, and which, as your orators are informed and believe, covers the whole or the greater part of all the equipment which belongs to and is used on the said line of railroad.

And your orators allege that the said instrument was not executed, acknowledged, and filed for record as provided by law, and that the same is, as they are advised and believe, null and void.

And your orators further allege that if the said instrument had been so executed, acknowledged, and recorded as to become a valid and binding chattel-mortgage upon the property therein described, the same would have been in all respects subject to each of the three mortgages hereinbefore described, and dated March 10, 1869, March 12, 1872, and April 24, 1872, and that the same is in fact in all respects subject to the said three mortgages so given to your orators as aforesaid.

Your orators further show to your honors that they are informed and believe that none of the said chattel-mortgage bonds have ever been sold by said company, but that the same, to the amount of nine hundred and thirty-six thousand ($936,000) dollars, have been put in the hands of various holders of the floating indebtedness of said company as collateral thereto, and that said bonds to the amount of sixty-four thousand ($64,000) dollars have never been issued at all.

Your orators further allege that, by reason of the insolvency of said company, it will be utterly impossible for the said company to fulfill the terms and conditions of the certificates of indebtedness hereinbefore described, and issued by the president of said company, or to pay the coupons attached thereto, and that by reason thereof, and in consequence of the default of said company in payment of the coupons attached to said certificates of indebtedness, the owners of the unpaid coupons of the said four millions (4,000,000) of bonds are entitled to rescind the said funding arrangement, and to demand and enforce payment of the said coupons so funded as aforesaid.

And your orators further allege that, by reason of the default of said company in the payment of the coupons due October 1, 1873, and subsequent thereto, which have never been funded, the principal of all of the said bonds has, by the terms and conditions of the mortgage securing the same, become due and payable, and all of the said Illinois division bonds, and of the said Indiana division bonds, were, by the terms and conditions of the mortgage securing the same, and in
18 consequence of the defaults aforesaid, due and payable prior to the commencement of this suit.

Your orators further allege that of the said Illinois division bonds six hundred and ninety-eight thousand dollars thereof have never been funded by the holders thereof, and the holders thereof have never in any way consented to the conditions of the default in the payment of interest thereon.

Your orators allege that they have been requested by the holders of a majority of said Illinois division, and also by the holders of a large number of the said Indiana bonds, to proceed to collect the principal and interest of said bonds by foreclosure and sale of all of the railroad, franchises, property, and appurtenances of said company, within the State of Illinois.

Your orators further allege that said Indiana division is wholly insufficient to secure the payment of the said Indiana division bonds in full, and that said Illinois division of said road is more than sufficient to secure the payment of said Illinois division bonds in full, but is not suf-

ficient security for the payment in full of the whole of the Indiana division bonds, after the said Illinois division bonds have been first paid out of the proceeds thereof.

Inasmuch, therefore, as your orators have suffered loss and damage in the premises, and are remediless, except in equity, where matters of this kind are properly cognizable and relievable, they pray that the said Chicago, Danville and Vincennes Railroad Company, and the said James W. Elwell, whose appearance have already been entered in this cause as parties defendant thereto, may be required to answer this your orators' amended bill, but without oath, which is hereby expressly waived, and that the said R. Biddle Roberts may be made party defendant hereto, and summoned to answer this your orators' bill, but without oath, which is hereby expressly waived; and that the receiver heretofore appointed upon the prayer of the original bill in this cause may still hold the said railroad, its equipment and appurtenances, and operate the same under the order and direction of this honorable court; and that an account be taken of the amount due by the said railroad company upon the said Illinois division bonds and upon the said Indiana division bonds separately, and that the said railroad company be ordered to pay the amount so found due upon said bonds, severally, within a short time, to be limited by this honorable court, and that upon default thereof the said Illinois division of the said railroad, together with all of the franchises, equipment, and appurtenances thereof, may be sold by the master in chancery of this court, for the payment, first, of the said twenty-five hundred (2,500) Illinois division bonds; and, secondly, of the fifteen hundred (1,500) Indiana division bonds, which are the first and second liens upon the said Illinois division of said railroad, its equipments, franchise, and property, as hereinbefore
19 set forth, or for such other and further relief as to your honors shall seem meet, and to equity shall appertain.

WILLIAM R. FOSDICK AND
JAMES D. FISH,
Trustees,
By GEO. C. CAMPBELL, *their Solicitor.*
LAWRENCE, CAMPBELL & LAWRENCE, *of Counsel.*

EXHIBIT A.

Form of bond.

No. .| UNITED STATES OF AMERICA, STATE OF ILLINOIS. |$1,000.

Chicago, Danville and Vincennes Railroad Company.

First mortgage seven per cent. sinking fund bond, principal and interest payable in gold.

Know all men by these presents that the Chicago, Danville and Vincennes Railroad Company, a corporation existing under the laws of the State of Illinois, for value received, acknowledges itself indebted to Joseph E. Young in the sum of one thousand dollars, in United States gold coin at par, which it promises to pay in the city of New York to him or bearer, on the first day of April, in the year one thousand nine hundred and nine, with interest at the rate of seven per centum per annum, in gold coin as aforesaid, payable semi-annually, on the first

days of April and October in each year, on the delivery of the annexed interest warrants, in the city of New York, at such place as may be designated by said company by advertisement published in said city.

This bond, with others of like tenor and date, amounting, in the aggregate, to a sum not exceeding two millions and five hundred thousand dollars, is secured by a mortgage on the railroad, franchises, income, equipments, and property of said company, duly made and delivered to trustees, whose names are signed to the certificate of authentication of this bond, for the benefit of the holder hereof, dated the tenth day of March, one thousand eight hundred and sixty-nine, and duly recorded.

This bond is entitled to all the benefit to be derived from a sinking fund, to be annually created and invested as provided for in the deed of trust or mortgage above referred to. And it is agreed between said company and the holder of this bond that no recourse shall be had for its payment to the individual liability of any stockholder of said company; and that in case of any default in the payment hereof, the said company hereby waives the benefit of any extension, stay, or appraisement laws now existing or that may hereafter exist.

This bond shall pass by delivery or by transfer on the books of the company, in the city of New York. After a registration of ownership, certified hereon by the transfer-agent of the company, no transfer, except on the books of the company, shall be valid, unless the last transfer be made to bearer by the transfer-agent of the company, which shall restore transferability by delivery; but this bond shall continue subject to successive registrations and transfers to bearer as aforesaid, at the option of each holder.

This bond shall not be valid or obligatory until it shall have been authenticated by a certificate endorsed hereon, and duly signed by the trustees under the mortgage aforesaid.

In witness whereof the said company have caused the foregoing to be attested in its behalf by its president and secretary, and its corporate seal to be affixed hereto, and the interest-warrants hereto annexed to be signed by its secretary, at the city of Chicago, in the State of Illinois, this tenth day of March, eighteen hundred and sixty-nine.

President.

Secretary.

(Coupon.)

$35.

The Chicago, Danville and Vincennes Railroad Company will pay the bearer, at its agency in the city of New York, thirty-five dollars in coin, on the first day of , A. D. , for semi-annual interest on its first-mortgage bond, No.

Secretary.

(Endorsement.)

No. . Chicago, Danville and Vincennes Railroad Company. Seven per cent. sinking-fund bond. $1,000. Principal and interest payable in United States gold coin at par. Principal payable April 1st, 1909. Interest payable April 1st and October 1st, in New York.

(Trustees' certificate.)

We certify that this bond is one of a series amounting to $2,500,000, described in and secured by the deed of trust or mortgage mentioned herein, bearing date March 10th, 1869, which is recorded according to law.

Trustees.

21 EXHIBIT B.

Form of mortgage.

This indenture, made this tenth day of March, in the year one thousand eight hundred and sixty-nine, between the Chicago, Danville and Vincennes Railroad Company, a corporation of the State of Illinois, party of the first part, and William R. Fosdick and James D. Fish, of the city and State of New York, trustees, upon certain trusts hereinafter specified and provided, the party of the second part:

Whereas the Chicago, Danville and Vincennes Railroad Company, a corporation of the State of Illinois, under and in pursuance of the provisions of the act incorporating the same, has commenced to construct and put in operation a railroad from Chicago, in Cook County, Illinois, southerly through the counties of Cook, Will, Kankakee, Iroquois, and Vermillion, to the city of Danville, and then southeasterly to a point on the State line of Indiana, joining and connecting at said point with the Evansville, Terre Haute and Chicago Railroad, and is now engaged in constructing the same;

And, for the purpose aforesaid, needs, and has resolved to purchase and transport iron rails, chairs, spikes, and other iron and materials necessary therefor, and engines, cars, and other rolling stock and machinery to be used thereon; and to borrow a portion of the money necessary to make such purchases and to pay for such transportation, and the construction, completion, and equipment of said road;

And whereas, at a meeting of the board of directors of the said Chicago, Danville and Vincennes Railroad Company, the party of the first part, held pursuant to law, on the second day of February, in the year 1869, the said board of directors resolved and enacted an order and resolutions as follows, to wit:

"Resolved, That, to aid in providing the means required for the construction and equipment of this company's road, an issue of bonds shall be made by the company, amounting to two millions and five hundred thousand dollars, each bond to be for the sum of $1,000, and to bear seven per cent. per annum interest, payable semi-annually, on the first days of April and October in each year, and the principal to be payable on the first day of April, 1909, and both principal and interest to be payable in United States gold coin, at par, in the city of New York; and each bond to contain an express waiver of all recourse by the holder of the same to any individual liability of the stockholders of this company.

"That said bonds shall be dated as made on the tenth day of March, A. D. 1869.

"In case default be made in the payment of any half year's interest on any of said bonds, and the warrant for said interest shall have
22 been presented and its payment demanded, and such default shall have continued for six months after such demand, without the

consent of the holder of said coupon or bond, then and thereupon the principal all such bonds shall become immediately due and payable. That a warrant for each semi-annual payment of interest shall be made and authenticated, for and on behalf of this company, by the secretary of this company, and annexed to each bond. That said bonds shall be prepared by the president of the company, and signed by him for and on behalf of this company, and attested by the secretary, and shall have annexed to them a certificate of authentication of the trustee or trustees, under the mortgage made to secure them, and shall not be issued or obligatory without such certificate.

"That from and after the first day of April, A. D. 1873, and until the maturity of said bonds, there shall be annually created, paid, and deposited with a sinking-fund commissioner or commissioners, to be appointed by the board of directors, and to hold office at the pleasure of the board, a sinking fund, to aid in the final redemption of said bonds, of an amount of money derived from the net earnings of said road and property equal to one-half of one per cent. on the whole amount of said issue of bonds at the time of any such payment outstanding. Said fund, and all investments and accounts thereof, and its management, shall always be under the control of this board, and shall be from time to time continually invested by the commissioner or commissioners in the purchase of said bonds or bonds of the Government of the United States, or of the State of Illinois; and the interest on all such investments, as collected, shall be added to and continually compounded with said fund, and the same shall be used and appropriated solely to redeem and eventually pay off said issue of bonds hereby provided to be made.

"No bond of said issue purchased by said fund shall thereby be canceled, but shall, with its coupons, be stamped as owned by said sinking fund, and it, or its amount if destroyed, shall remain a liability against the company, and the interest shall be paid to the said sinking fund the same as paid on other bonds, and shall be added to said fund until the whole of said issue of bonds shall have been absorbed or otherwise paid off, when the whole issue shall be canceled. Any bonds of said issue which may be in said sinking fund at any time may be destroyed by order of the board of directors of said company; but in such case the semi-annually accruing interest on the amount so destroyed must thereafter be paid to said sinking fund. The bonds and securities belonging to the sinking fund shall be kept in the office of the sinking-fund commissioner or commissioners, which shall be at or near the principal office of said railroad company.

"That for the purpose of securing the final payment of said issue of $2,500,000 of bonds, with all interest to accrue thereon, this company
23 will make and deliver to William R. Fosdick and James D. Fish, as trustees, a mortgage and deed of trust, conveying to said persons as trustees, for the benefit of every holder of such bonds, or any of them, all the road of this company, extending from Chicago, in Cook County, Illinois, southerly through the counties of Cook, Will, Kankakee, Iroquois, and Vermillion, to the city of Danville, and thence southeasterly to a point on the State line of Indiana, where it will join and connect with the *the* Evansville, Terre Haute and Chicago Railroad, with all the property, rights, and franchises of this company of every kind and description whatever, pertinent to said road between said terminal points, and all the income to be had and derived from operating the same, in trust, to secure the final payment of said bonds as aforesaid, with all the rights, covenants, powers, and authority, in case default be made by this company in such payments as in said deed of trust shall be speci-

fied, to foreclose said mortgage, and to sell the property so mortgaged, or to take possession of and operate the same, and receive the incomes thereof; but not in any case, before any default, to disturb or interfere with this company in the possession, control, and management thereof, or from receiving the incomes thereof, or from selling or exchanging any of the personal property, or machinery, or equipments thereof, or any of the lands or real estate not necessary for the use and operation of the railroad; as to all of which, as will be in said mortgage and deed of trust specifically stated, agreed upon, and set forth.

"That the president of this company is hereby authorized and fully empowered to make and sign, and execute and seal with the corporate seal of this company, the said mortgage and deed of trust, and to acknowledge the same for and on behalf of this company for record; and on the acceptance of said trust, and signing the said deed by the said trustees, to cause the same to be recorded according to law, and thereupon to make, sign, execute, and prepare said $2,500,000 of bonds for issue and sale, as shall be hereafter ordered by this board."

And whereas the said Chicago, Danville and Vincennes Railroad Company, party of the first part, hath, in accordance with the provisions of said order and resolution, made and executed bonds to the amount of two millions and five hundred thousand dollars, of the form, denomination, and character prescribed by said order and resolution, and hold the same to be authenticated, issued, used, and disposed of for the purposes in said order and resolution stated:

Now, therefore, in further pursuance of said order and resolution, and to the end and purpose of securing and assuring the punctual payment of said two millions and five hundred thousand dollars of bonds, and every part thereof which may be issued, to the persons who may become the holders of the same, or any of them:

24 This indenture witnesseth that the said Chicago, Danville and Vincennes Railroad Company, party of the first part, in consideration of all and singular the premises, and for the further consideration of one dollar to them in hand paid by the said party of the second part, trustees aforesaid, at and before the ensealing hereof, the payment of which is hereby acknowledged, doth hereby grant, bargain, sell, enfeoff, release, assign, and convey unto the said William R. Fosdick and James D. Fish, trustees as aforesaid, party of the second part, and to their successors and assigns, all and singular the entire railroad of the party of the first part, lying, being, and extending from its terminus, in the city of Chicago, in Cook County, Illinois, southerly through the counties of Cook, Will, Kankakee, Iroquois, and Vermillion, to the city of Danville, and thence southeasterly to a point on the State line of Indiana, joining and connecting at said point with the Evansville, Terre Haute and Chicago Railroad, being in length about one hundred and forty miles, with all its franchises, equipments, property, tolls, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods, and chattels, connected with or used in the using or operating of said railroad, or appurtenant thereto, and all its rails, ties, fuel, fencing, and erections, and all its rights of way and easements, and all cars, engines, and tools, and all rents, reservations, and reversions of every nature and kind whatever, including all the property between said terminal points which said party of the first part now has or owns and possesses, or may hereafter acquire, either in law or equity, of every kind whatever, pertinent thereto.

Provided, however, that this grant and conveyance aforesaid shall not include nor operate to transfer any lands, goods, chattels, property,

machinery, equipment, or other matters, which said company now owns, or may hereafter acquire, that need not be used for any purpose incident to the management or operation of said railway, or the repair thereof, or in the business of said railway company; nor any franchises, power, or corporate right to build that portion of the line of railroad which, by its charter, it is authorized to locate and construct, and not embraced within the terminal points hereinbefore described; but all which last-mentioned franchises and right of way shall be wholly excepted and exempt from these presents, and the grant and conveyance herein specified; nor shall these presents in any way prohibit the party of the first part from selling and conveying or otherwise disposing of the same, and all the proceeds thereof; nor from receiving, using, and applying any money or personal property of said company to the repairs of said road or its appurtenances, or to its current expenses, or to the purchase of necessary machinery, or the renewal thereof; and the board of directors of said company may likewise distribute and pay any net annual incomes and profits to stockholders, after paying the interest on the said bonds, and providing for any sinking fund required to be created and kept. To have and to hold the said railway property, premises, interests, rights, and appurtenances mentioned as aforesaid, and hereby conveyed, or intended so to be, by this conveyance, unto the said party of the second part, as such trustees as aforesaid, and to their successors in said trust, or assigns, to and for the only use, benefit, and behoof of the said trustees, and their cestui que trust, their successors and assigns, forever; but in special trust and confidence, and upon the conditions following, that is to say:

1st. That this conveyance is for, and shall be by the said party of the second part, their successors and assigns, held, used, and owned solely for the benefit and protection and security of the persons and corporations who shall hold and own the bonds about to be issued as aforesaid by the party of the first part, and for enforcing the stipulations of said company as to said issue of bonds, and the disposal thereof and securing the same, and the final payment thereof, in their true intent and meaning, whether contained in said bonds, or the interest warrants attached to them, or in this deed.

2d. That for the better assuring and confirming the title and powers of the said party of the second part, their successors and assigns, in the said premises and property hereby conveyed, and in and to any premises and property or rights hereafter accruing, or to be acquired by said party of the first part, appurtenant to said railroad, which is intended to pass or be passed by this conveyance, the said party of the first part, their successors and assigns, will and shall, as often as may be lawfully required by the party of the second part, or their successors or assigns, holding the above-granted trust, do such acts and make such other and further conveyances and assurances in law as such party of the second part shall, by counsel learned in the law, be advised are necessary for the better carrying out of the object of the parties to this mortgage or deed of trust.

3d. That if the said party of the first part, their successors or assigns, shall well and truly pay to the holders of said two millions and five hundred thousand dollars of bonds, so to be issued and hereby secured, the respective sums of money and interest due and accruing on said bonds on the days and times therein mentioned, and according to the tenor and effect of said bonds, then and thenceforth this indenture, and all the estate hereby granted, shall become and be utterly void and of no further effect; and the same shall be, by such payment, wholly an-

nulled and satisfied, without any further receipt or entry of satisfaction of record whatever, but shall be, if required, entered and certified on any record of the same as so satisfied by the party of the second part, or their successors.

4th. That until default shall have been made by the party of the first part in the payment of principal or interest of the said bonds, or some of them, or until default shall have been made in respect to some-
26 thing herein required to be done by the said party of the first part, the said party of the first part shall be suffered and permitted to possess, use, occupy, manage, and operate the said railroad property and franchises, and appurtenances, and to renew, replace, and repair the same, and every part thereof, and take and receive, and use the tolls, rents, issues, incomes, and profits thereof, and dispose of the same in any manner not inconsistent with this instrument.

5th. In case default shall be made in the payment of any interest, on any of the aforesaid bonds issued or to be issued, according to the tenor of the coupons thereto annexed, or of the provisions hereof; or, in case default shall be made in the payment of the principal of said bonds, or any of them, when the same shall become due, without the consent of the holder of such bond on which such default shall occur, the said party of the first part hereby covenants and agrees to and with the party of the second part, and their successors and assigns, that within six months after such default shall have occurred, the same default still continuing, the said party of the first part, on demand of the said trustee or trustees for the time being, shall and will surrender to him or them, or to their agent, the actual possession of the herein granted and demised railroad and premises, together with all the books, records, papers, accounts, and money of said company, and all management and control thereof; and that all the expenses of taking, holding, managing, and operating said property, if possession be so taken, shall be paid from the incomes and profits thereof; and if said property shall, after such taking possession thereof, be sold, then from the sale thereof; or such expenses may be paid from the sale of any personal property, as the said trustees may deem proper; and that said party of the second part and their successors, having taken such possession, may manage, operate, and control said road and property and all of its affairs, and appoint all needful agents and employees for that purpose, and pay the same, and receive all the incomes, issues, and profits thereof, and apply the same to the payment of the said interest so in default, according to the true intent and tenor of the said bonds and the coupons annexed, and to the terms of this deed, until such default shall have been satisfied, if such incomes and profits will satisfy the same, first paying all expenses of such possession and management, and all taxes, assessments, and charges on said property, and a just compensation for their own services as such trustees. But in any and all cases of such taking of possession by said party of the second part, and paying up any such default, and the expenses aforesaid, the said party of the second part shall immediately thereafter redeliver the said railway and premises, books, records, and money and accounts into the possession of the party of the first part; provided, that no such demand for such possession shall be made by said trustee or trustees, until they shall have been required by the holders of at least the one-half of all of the said issue of bonds which shall
27 then be unpaid and outstanding to make such demand, and to take such possession of said road and property.

6th. That in case default shall be made as aforesaid, and shall continue as aforesaid, it shall be lawful for the party of the second part, or

their successors in said trust, after entry as aforesaid, or other entry, or without entry, personally, or by agent or attorney, to sell and dispose of to the highest bidder, all and singular the premises hereby conveyed or intended so to be, as an entirety at public auction, in the city of Chicago, State of Illinois, at such time as said party of the second part may appoint, first having demanded of the party of the first part full payment of all money then in default; and also first having given sixty days' notice of such time and place of sale, and a full description of the property so to be sold, by advertisement thereof in two newspapers, one published in Chicago, in the State of Illinois, and one published in the city of New York; and to adjourn said sale from time to time, in thei discretion, and, if adjourned, to make such sale in manner aforesaid without further notice, at the time and place to which it may be so adjourned; and upon such sale, and receiving the purchase money therefor, to convey the same, by good and sufficient conveyances, to the purchaser or purchasers; and such sale and conveyance so made shall convey all the right, title, estate, interest, and property of the said party of the first part, of, in, and to the said road, premises, franchises, and property to the said purchaser in fee simple forever; and shall be a perpetual bar, both in law and equity, against the said party of the first part and their successors and assigns, and against all and every person claiming or to claim the said premises, or any part thereof, under them, forever. After deducting from the proceeds of such sale the expenses of the sale and conveyance, and all advances or liabilities which may have been made or incurred by the party of the second part in operating and controlling and maintaining the said railroad and property, and in managing its business and affairs while in possession, and all payments for taxes, charges, and assessments on said premises or any part thereof, as well as reasonable compensation for their own services, to apply the proceeds of such sale to the payment of the interest of said two millions and five hundred thousand dollars of bonds, or so many of them as shall have been issued by said party of the first part and be then outstanding, pro rata, until all such interest shall be paid, and afterwards to apply the remainder to the payment of the principal of said bonds pro rata until such principal shall be paid; and if any surplus remain after paying all of said matters, to pay such surplus to the party of the first part; and such payments shall be so made on said bonds, whether the same shall have become due or not at the time of such sale; provided, that said trustee or trustees may, in their discretion, sell the said premises as an entirety, and on doing so shall make legal distribution of the proceeds of such sale accordingly.

28 It is hereby declared that the receipt of said trustee or trustees, making any such sale to the purchaser of the premises for the purchase money, shall be a full and sufficient discharge of such purchaser therefor, and that said purchaser shall not after payment of said purchase money, and obtaining such receipt therefor, be liable, or in any way bound, to see said purchase money applied to this trust, or otherwise or in any manner answerable for its loss or misapplication, or obliged to inquire into the authority for making such sale.

7th. At any sale of the property aforesaid, or any part thereof, made by virtue of these presents, or by judicial authority, the said trustee or trustees may bid for and purchase, or cause to be purchased, the property so sold, or any part of it, in behalf of the holders of said bonds secured by this deed, then outstanding, at a reasonable price, if only a part be sold; but if the whole property be sold, at a price not exceeding the whole amount of said bonds and interest then outstanding.

8th. If default be made by the party of the first part in the payment of any half year's interest on any of said bonds, and the warrant or coupon for such interest shall have been presented, and its payment demanded, and such default shall have continued six months after such demand, without the consent of the holder of such coupon or bond, then and thereupon the principal of all of the said bonds hereby secured shall be and become immediately due and payable, anything in such bonds to the contrary notwithstanding; and the said party of the second part may so declare the same, and notify the party of the first part thereof, and upon the written request of the holders of a majority of the said bonds then outstanding, shall proceed to collect both principal and interest of all such bonds outstanding by foreclosure and sale of said property, or otherwise, as herein provided.

9th. It is hereby mutually agreed by the parties hereto, that the trustees shall be responsible only for gross negligence and willful default, and that they shall not be bound to do any act touching the execution of the trust, except at their own option, which may involve them in personal expense or liability, unless first duly and satisfactorily indemnified against the same by one or more of said bondholders.

In case of the death, resignation, or inability to act of any trustee, the board of directors may appoint a successor, and failing to so appoint, any court of competent jurisdiction may appoint a trustee to fill such vacancy on the application of the holders of the one-sixth part of the bonds hereby intended to be secured then outstanding, and such appointment by the board or by such court shall invest the trustee so appointed with all the interest, estate, power, and authority in the premises, and subject him or them to the same obligations hereby given and granted to the party of the second part herein.

29 And the said party of the first part hereby further covenants and agrees with the party of the second part, and their successors, and with the holders of each and all of the said issue of two millions and five hundred thousand dollars of bonds which may be issued, that the said party of the first part will create and make a sinking fund for the redemption of such bonds, and each of them, by setting aside and depositing with a sinking-fund commissioner or commissioners, to be appointed by the party of the first part for that purpose, from and after the first day of April, in the year 1873, and annually thereafter, until the maturity of said bonds, from the net earnings of the said road and property, after the payment of all the interest on said bonds, an amount of money equal to the one-half of one per cent. of the principal amount of all such bonds hereby secured, which shall then be outstanding. Such sinking-fund moneys shall, from time to time, under the orders of the party of the first part, be invested in the purchase of the bonds so issued, or in bonds of the Government of the United States or of the State of Illinois; and the money accruing on any and all of such investments for interest, as fast as the same shall be received, shall be added to and paid into the sinking fund, and compounded therein continually, and reinvested, in like manner, with the other money of said fund, and the same shall be used solely to redeem and eventually pay off said bonds herein and hereby secured.

That the board of directors of said railway company, party of the first part, shall have entire control over the management of said sinking fund, and every person in charge of, or connected with the same, and shall, from time to time, direct in what bonds or securities it shall be invested, and at what prices or rates, and how it shall be kept, and the manner of keeping the accounts thereof; and shall require ample

security to be given to them by any person in charge of its moneys, or its securities or bonds, for its safe keeping.

Every bond of the said issue which may be purchased and held by said sinking fund shall remain in full force until the whole of such issue shall have matured or shall have been so absorbed, or otherwise redeemed, by said party of the first part, or until canceled, as hereinafter provided; and the interest on such bonds held by said sinking fund shall be paid by said railroad company regularly, as the interest on its other similar bonds is paid; and such bonds so in the sinking fund shall, as to the annual amount of money to be paid from net earnings into said fund, be regarded as outstanding.

At the annual meeting of the stockholders, in the year 1874, and at each annual meeting thereafter, all bonds of said issue, and the coupons thereon then being in the sinking fund, purchased by said fund as aforesaid, shall be withdrawn from said fund, and canceled, and so certified by the commissioner and treasurer of the company, and the signatures thereto mutilated; and in place thereof, the treasurer of the company shall give to the commissioner a receipt therefor, specifying the same, and such cancellation, which receipt shall be filed in the office of said fund, and shall, semi-annually, draw and entitle said sinking fund to the same amount of interest as the bonds so canceled would have done, and for the same purposes.

It is understood and agreed by and between the parties hereto that no individual liability shall attach to any stockholders of the party of first part in behalf of the holders of any of the bonds secured by this mortgage or deed of trust, and that the holders of said bonds rely solely on the property, rights, and franchises of the party of the first part covered by this mortgage, and the stipulations and covenants of the said party of the first part herein contained, for the payment of the principal and interest of the bonds so held by them.

In witness whereof the said Chicago, Danville and Vincennes Railroad Company, the party of the first part, has caused these presents to be executed, and signed by the president of their company and attested by their secretary, in their behalf and for the said company, and has caused the corporate seal of the company to be hereto affixed, the day and year first above written. And the parties of the second part have hereunto set their hands and affixed their seals the same day and year aforesaid.

CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY,
By W. D. JUDSON, *President.*
[SEAL.] F. E. JONES, *Secretary.*

Executed in the presence of—
GEORGE P. ANDREWS.
JOHN GARDNER.

W'M R. FOSDICK, [SEAL.]
JAMES D. FISH, [SEAL.]
Trustees.

STATE OF NEW YORK,
City and County of New York, ss:

Before me, the undersigned, a notary public of the State of New York, in the city of New York, duly commissioned and qualified, personally came this day William D. Judson, known to me to be the president of the Chicago, Danville and Vincennes Railroad Company, the party of

the first part in the above deed of trust, and who executed the same on behalf of said company, and acknowledged that the said railroad company, and he, as the president of said company and in its behalf, did sign, seal, and deliver the said indenture and deed of trust, as and for its own act and deed, and for the uses and purposes therein mentioned. Also personally appeared before me, at the same time, the above-named William R. Fosdick and James D. Fish, trustees, and the parties of the second part in the foregoing mortgage and deed of trust, and both personally known to me as the persons who signed the same as such, and each acknowledged that he did sign, seal, and execute the same for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this thirtieth day of March, anno Domini 1869.

[NOTARIAL SEAL.] GEORGE P. ANDREWS.
Notary Public, New York City and County.

31 EXHIBIT C.

Articles of consolidation between the Chicago, Danville and Vincennes Railroad Company and the Rossville and Indiana Railroad Company.

Articles of consolidation made, agreed upon, and concluded this fourth day of March, A. D. 1872, between the Chicago, Danville and Vincennes Railroad Company and the Rossville and Indiana Railroad Company, corporations duly incorporated and instituted as such by virtue of the laws of the State of Illinois.

Whereas the roads of the said companies intersect each other in the town of Ross, in the county of Vermillion, at a point on the said Chicago, Danville and Vincennes Railroad distant about six miles southeasterly from the village of Rossville, in said county, and form a continuous line from said point of intersection to the boundary line of the State of Indiana;

And whereas said companies, under their respective charters and the laws of the State of Illinois, are authorized to consolidate their stock and property with each other:

Now, therefore, it is hereby mutually agreed:

First. That from and after the date hereof the stock and property of the said Rossville and Indiana Railroad Company be, and the same is hereby, consolidated with the stock and property of the said Chicago, Danville and Vincennes Railroad Company, and that henceforth the said companies shall constitute but one corporation in the law.

Second. It is mutually agreed that the name of the said consolidated company shall be the Chicago, Danville and Vincennes Railroad Company, by which name it shall act and be described and known, and shall be clothed with all the franchises, power, and privileges conferred upon it by the original charters of said consolidating companies by the acts of the legislature of the State of Illinois authorizing consolidations in this and like cases, and by other laws of the State of Illinois relating to or affecting it.

Third. It is further mutually agreed that the stock in the respective companies shall be deemed and taken to be of equal value; and for every share in the Chicago, Danville and Vincennes Railroad Company, the said consolidated company shall issue to the holders thereof one share in the new or consolidated company, and for every share in the Rossville and Indiana Railroad Company the said consolidated company shall, in like manner, issue to the holder thereof one share of stock in the new company.

Fourth. As a consequence of said consolidation, it is hereby mutually understood and agreed that the consolidated company becomes liable for and assumes all the contracts and liabilities, and is to fulfill, perfect, and discharge all the duties and obligations of each of the consolidated companies.

32 In witness whereof the parties hereto have caused these presents to be subscribed by their respective presidents and secretaries, and their respective seals to be hereto affixed, the day and year first above written.

CHICAGO, DANVILLE & VINCENNES RAILROAD COMPANY,
By W. D. JUDSON, *President.*

[CHICAGO, DANVILLE & VINCENNES RAILROAD COMPANY SEAL.]
J. S. CAMPBELL, *Secretary.*

ROSSVILLE & INDIANA RAILROAD COMPANY,
By J. E. YOUNG, *President.*

[ROSSVILLE & INDIANA RAILROAD COMPANY SEAL.]
E. H. JACQUELIN, *Secretary.*

Approved.

A. B. MEEKER,
J. E. YOUNG,
J. S. CAMPBELL,
C. B. MANSFIELD,
C. GREENWOOD,
Directors of the Rossville & Indiana Railroad Company.

Approved.

W. D. JUDSON,
WILLIAM YOUNG,
JA'S W. ELWELL,
MATT. TAYLOR,
JOHN TENNEY,
JAMES D. FISH,
A. GILBERT,
AMOS TENNEY,
N. F. MERRILL,
Directors of the Chicago, Danville & Vincennes Railroad Company.

The consolidation of the property and stock of the two contracting parties named in the foregoing articles of consolidation, in the manner and upon the terms therein contained, has been made and concluded with our consent and by our directions, and we hereby fully approve of and adopt the action of the directors and of the presidents and secretaries of the consolidating companies in executing the said articles and in completing such consolidation.

In witness whereof we, the stockholders in the said respective companies, have hereunto set our hands and seals this fourth day of March, A. D. 1872.

STOCKHOLDERS OF THE ROSSVILLE & INDIANA RAILROAD COMPANY.

J. S. Campbell	5	shares.
A. B. Meeker	5	"
J. H. Wrenn	5	"
W. L. Brown	5	"
Will. G. Stephens	5	"
C. B. Mansfield	1	"
E. H. Jacquelin	1	"
N. W. Jones	1	"

33	C. Greenwood	1 shares.
	M. W. Smith	5 "
	J. F. Torrence	5 "
	E. Walker	1 "
	W. D. Judson	95 "
	J. E. Young	200 "
	Amos Tenney	100 "
	F. E. Jones	1 "
	J. W. Wood	1 "
	E. E. Lawrence	1 "
	J. A. Flowers	1 "
	A. N. Hart	1 "
	W. B. Ullman	5 "

STOCKHOLDERS OF THE CHICAGO, DANVILLE & VINCENNES RAILROAD COMPANY.

William Young	1,740 shares.
F. L. Simons	960 "
N. F. Merrill	2,000 "
H. D. Osborn	1,000 "
Joseph E. Young	5,700 "
W. D. Judson	2,205 "
A. Gilbert	5 "
Ja's W. Elwell	5 "
James D. Fish	5 "
Matt. Taylor	5 "
John Tenney	684 "
Amos Tenney	2,321 "
Edward G. Judson	500 "

I, J. S. Campbell, secretary of the Chicago, Danville and Vincennes Railroad Company, do hereby certify that the foregoing articles of consolidation have been signed by all the directors of said company, and that the same have been satisfied, approved, and confirmed by the written consent of all the stockholders of said company.

Dated March 4th, 1872.

J. S. CAMPBELL,

Secretary of the Chicago, Danville & Vincennes Railroad Company.

[CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY SEAL.

I, E. A. Jacquelin, secretary of the Rossville and Indiana Railroad Company, do hereby certify that the foregoing articles of consolidation have been signed by all the directors of said company, and that
34 the same have been satisfied, approved, and confirmed by the written consent of all the stockholders of said company.

Dated March 4th, 1872.

E. H. JACQUELIN,

Secretary of the Rossville & Indiana Railroad Company.

[ROSSVILLE & INDIANA RAILROAD COMPANY SEAL.]

Filed in the office of the secretary of state of Illinois, at Springfield, Illinois, March 14th, 1872.

Certified copy among company's papers.

NOTE.—The original C., D. & V. R. R. Co. was incorporated by special act of the Illinois legislature, approved February 16th, 1865.

The Rossville & Indiana Railroad Company was organized under the

general laws of Illinois. The articles of association were filed in the office of the secretary of state, at Springfield, February 23d, 1872.

The above consolidation formed C., D. & V. R. R. Co., No. 2.

EXHIBIT D.

Articles of consolidation between the Chicago, Danville & Vincennes Railroad Company and the Western Indiana Railroad Company.

Articles of consolidation made, agreed upon, and concluded this ninth day of March, A. D. 1872, between the Chicago, Danville and Vincennes Railroad Company, a corporation duly incorporated and constituted as such by virtue of the laws of the State of Illinois, and the Western Indiana Railroad Company, a corporation duly organized and existing under the laws of the State of Indiana.

Whereas the said corporations have a common terminus on the line dividing the States of Illinois and Indiana, which has been fixed by said companies by and under their charters, at a point located on the State line, and between the town of Ross, in Vermillion County, Illinois, and the town of Marshfield, in Warren County, Indiana, and distant about ten miles southeasterly from the village of Rossville, in Vermillion County, aforesaid:

And whereas the roads of said companies, as now located, form a continuous line from the city of Chicago, in the State of Illinois, through said point on the State line to Brazil, in Clay County, in the State of Indiana, and are, therefore, under their respective charters, and the laws of the said States of Illinois and Indiana, authorized to consolidate their stock and property with each other:

Now, therefore, it is mutually agreed:

First. That from and after the date hereof the stock and property of he said Chicago, Danville and Vincennes Railroad Company be, and the same is, hereby consolidated with the stock and property of 35 the said Western Indiana Railroad Company, and that henceforth the said companies shall constitute but one corporation in the law.

Second. It is mutually agreed that the name of the said consolidated company shall be the Chicago, Danville and Vincennes Railroad Company, by which name it shall act and be described and known, and shall be clothed with all the franchises, powers, and privileges conferred upon it by the original charter of said consolidating companies by the acts of the legislatures of the said States of Illinois and Indiana, authorizing consolidations in this and like cases, and by other laws of the States of Illinois and Indiana relating to or affecting it.

Third. It is further mutually agreed that the stock of the respective companies shall be deemed and taken to be of equal value; and for every share in the Chicago, Danville & Vincennes Railroad Company the said consolidated company shall issue to the holders thereof one share in the new or consolidated company; and for every share in the Western Indiana Railroad Company the consolidated company shall in like manner issue to the holder thereof one share of stock in the new company.

Fourth. As a consequence of said consolidation, it is hereby mutually understood and agreed that the consolidated company becomes liable for and assumes all the contracts and liabilities, and it is to fulfill, perfect, and discharge all the duties and obligations of each of the consolidated companies.

In witness whereof the parties hereto have caused these presents to be subscribed by their respective presidents and secretaries, and their respective seals to be hereto affixed, the day and year first above written.

[CHICAGO, DANVILLE & VINCENNES RAILROAD COMPANY SEAL.]

CHICAGO, DANVILLE & VINCENNES RAILROAD COMPANY,
By W. D. JUDSON, *President.*

J. S. CAMPBELL, *Secretary.*

[WESTERN INDIANA RAILROAD COMPANY SEAL.]

WESTERN INDIANA RAILROAD COMPANY,
By E. WALKER, *President.*

N. W. JONES, *Secretary.*

Approved.

W. D. JUDSON,
WILLIAM YOUNG,
JAS. W. ELWELL,
MATT. TAYLOR,
JOHN TENNEY,
JAMES D. FISH,
A. GILBERT,
AMOS TENNEY,
N. T. MERRILL,

Directors of the Chicago, Danville & Vincennes Railroad Company.

Approved.

E. WALKER,
J. E. YOUNG,
C. B. MANSFIELD,
J. S. CAMPBELL,
C. GREENWOOD,

Directors of the Western Indiana Railroad Company.

36 The consolidation of the property and stock of the two contracting parties named in the foregoing articles of consolidation, in the manner and upon the terms therein contained, has been made and concluded with our consent, and by our directions, and we hereby fully approve of and adopt the action of the directors and of the presidents and secretaries of the consolidating companies in executing the said articles, and in completing such consolidation.

In witness whereof we, the stockholders in the said respective companies, have hereunto set our hands and seals, this ninth day of March, A. D. 1873.

STOCKHOLDERS OF THE WESTERN INDIANA RAILROAD COMPANY.

J. S. Campbell	5	shares.
E. Greenwood	5	"
C. B. Mansfield	5	"
E. H. Jacquelin	5	"
W. D. Judson	20	"
A. B. Meeker	5	"
J. H. Wrenn	5	"
Will. G. Stephens	5	"
E. D. C. Overman	5	"
R. M. Clinnie	5	"

E. Walker	5 shares.
R. Biddle Roberts	5 "
J. E. Young	400 "
Amos Tenney	20 "

STOCKHOLDERS OF THE CHICAGO, DANVILLE & VINCENNES RAILROAD COMPANY.

J. H. Wrenn	5 shares.
W. G. Stephens	5 "
M. W. Smith	5 "
W. L. Brown	5 "
E. Walker	1 share.
F. E. Jones	1 "
J. W. Wood	1 "
E. E. Lawrence	1 "
J. A. Flowers	1 "
C. B. Mansfield	1 "
E. H. Jacquelin	1 "
N. W. Jones	1 "
A. B. Meeker	5 shares.
J. T. Torrence	5 "
37 C. Greenwood	1 share.
W'm Young	1,740 shares.
F. L. Simons	960 "
N. F. Merrill	2,000 "
A. N. Hart	1 share.
W. S. Osborne	1,000 shares.
Joseph E. Young	5,700 "
W. D. Judson	2,205 "
A. Gilbert	5 "
W. B. Ullmann	5 "
Ja's W. Elwell	5 "
James D. Fish	5 "
Matt. Taylor	5 "
John Tenney	684 "
Amos Tenney	2,321 "
Edward G. Judson	500 "

I, J. S. Campbell, secretary of the Chicago, Danville and Vincennes Railroad Company, do hereby certify that the foregoing articles of consolidation have been signed by the president and all the directors of said company; that the same have been ratified, approved, and confirmed by the within written consent of all the stockholders of said company.

Dated March 9th, 1872.

J. S. CAMPBELL,
Secretary of the Chicago, Danville and Vincennes Railroad Company.

CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY SEAL.

I, N. W. Jones, secretary of the Western Indiana Railroad Company, do hereby certify that the foregoing articles of consolidation have been signed by the president and all the directors of said company, and that

the same has been ratified, approved, and confirmed by the written consent of all the stockholders of said company.

Dated March 9th, A. D. 1872.

N. W. JONES,
Secretary of the Western Indiana Railroad Company.

{ WESTERN INDIANA RAILROAD COMPANY SEAL. }

Filed in office secretary of state of Indiana, Indianapolis, March 14th, 1872.

Filed in office secretary of state of Illinois, Springfield, March , 1872.

Certified copies among company's papers.

NOTE.—The Western Indiana Railroad Company was organized under the general laws of Indiana.

38 The articles of association were filed in the office of the secretary of state, at Indianapolis, March 8th, 1872.

The above consolidation formed C., D. & V. R. R. Co. No. 3.

EXHIBIT E.

Articles of consolidation between the Chicago, Danville and Vincennes Railroad Company and the Attica and Terre Haute Railroad Company.

Articles of consolidation, made and agreed upon, and concluded this sixth day of May, A. D. 1872, between the Chicago, Danville and Vincennes Railroad Company, a corporation, duly incorporated, and constituted as such, by virtue of the laws of the States of Illinois and Indiana, and the Attica and Terre Haute Railroad Company, a corporation duly organized and existing under the laws of the State of Indiana.

Whereas the roads of said companies, as now located, intersect, join, and unite with each other by continuous lines, and they are, therefore, under their respective charters, and the laws of the States of Illinois and Indiana, authorized to consolidate their stock and property with each other;

And whereas, by a resolution of the board of directors of the Chicago, Danville and Vincennes Railroad Company, adopted at a meeting of said board held on the 11th day of April, 1872, and by a like resolution of the board of directors of the Attica and Terre Haute Railroad Company, adopted at a meeting of said board held on the first day of April, 1872, the terms and provisions embraced in this contract were submitted and recommended to the stockholders of their respective companies, as terms suitable and proper upon which to consolidate the stock and property of the said two companies with each other, which terms and provisions have been adopted by the consent and vote of the majority of the stockholders of the respective companies at meetings thereof duly called and held, and at which meetings a majority of the stock of the said respective companies was represented;

And whereas, by resolutions of the boards of directors of the respective companies, and by the vote of the stockholders of said companies, respectively, the presidents and secretaries of the said respective companies have been authorized and directed to cause to be prepared, and in behalf of, and under the seals of, their respective companies, to execute articles of consolidation, upon the terms herein contained;

Now, therefore, it is mutually agreed:

First. That from and after the date hereof the stock and property of the said Chicago, Danville and Vincennes Railroad Company be, and the same is hereby, consolidated with the stock and property of the said Attica and Terre Haute Railroad Company, and that henceforth the said companies shall constitute but one corporation in the law.

Second. It is also mutually agreed that the name of the consolidated company shall be the Chicago, Danville and Vincennes Railroad Company, by which name it shall act and be described and known, and shall be clothed with all the franchises, powers, and privileges conferred upon it by the original charters of said consolidating companies by the acts of the legislatures of the said States of Illinois and Indiana authorizing consolidations in this and like cases, and by the laws of the States of Illinois and Indiana relating to or affecting it.

Third. It is further mutually agreed that the stock in the respective companies shall be deemed and taken to be of equal value, and for every share in the Chicago, Danville and Vincennes Railroad Company, the said consolidated company shall issue to the holders thereof one share in the new or consolidated company; and for every share in the Attica and Terre Haute Railroad Company the consolidated company shall in like manner issue to the holders thereof one share of stock in the new company; provided, however, that all such stock shall be subject to the payments of such installments thereupon as may be unpaid at the time of this consolidation.

Fourth. There shall be nine directors to manage the affairs of the company, and their names are, James W. Elwell, James D. Fish, William D. Judson, Amos Tenney, Mathew Taylor, N. F. Merrill, John Tenney, George Nebeker, and Alvin Gilbert, who shall hold and discharge the duties of such office until a new board shall be elected.

Fifth. As a consequence of said consolidation, it is hereby mutually understood and agreed that the consolidated company, or the new Chicago, Danville and Vincennes Railroad Company, becomes liable for, and assumes all the contracts and liabilities, and is to fulfill, perfect, and discharge all the duties and obligations of each of the consolidated companies.

In witness whereof the parties hereto have caused these presents to be subscribed by their respective presidents and secretaries, and their respective seals to be hereto affixed, the day and year first above written.

[SEAL.] CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY,
By W. D. JUDSON, *President.*

J. S. CAMPBELL, *Secretary.*

[SEAL.] ATTICA AND TERRE HAUTE RAILROAD COMPANY,
By GEO. NEBEKER, *President.*

H. A. FREY, *Secretary.*

I, J. S. Campbell, secretary of the Chicago, Danville and Vincennes Railroad Company, do hereby certify that the foregoing articles of consolidation have been ratified, approved, and confirmed, by a vote of a majority of the stockholders of said company, at a special meeting of said stockholders, held at the office of said company, in the city of Chicago, Illinois, on the 30th day of April, 1872.

In witness whereof I have hereunto set my hand and affixed the seal of the said company, at Chicago, Illinois, this sixth day of May, A. D. 1872.

[SEAL.] J. S. CAMPBELL, *Secretary.*

I, H. A. Frey, secretary of the Attica and Terre Haute Railroad Company, do hereby certify that the foregoing articles of consolidation have been ratified, approved, and confirmed by a vote of a majority of the stockholders of said company, at a special meeting of said stockholders, held at the office of said company, at Covington, Indiana, on the 13th day of April, A. D. 1872.

In witness whereof I have hereunto set my hand and affixed the seal of the said company, at Covington, Indiana, this sixth day of May, A. D. 1872.

[SEAL.] H. A. FREY, *Secretary.*

We, the undersigned, do hereby certify that the within and foregoing is a true copy of the articles of consolidation of the Chicago, Danville and Vincennes Railroad Company, and of the Attica and Terre Haute Railroad Company, and of the whole of said articles.

Witness our hands and the seals of said companies, this sixth day of May, A. D. 1872.

[SEAL.] W. D. JUDSON,
President of the Chicago, Danville and Vincennes Railroad Company.
[SEAL.] GEORGE NEBEKER,
President of the Attica and Terre Haute Railroad Company.

Certificates.

STATE OF INDIANA,
Office of Secretary of State.

I, John H. Farquhar, secretary of state of the State of Indiana, do hereby certify that I have compared the within and foregoing with the articles of consolidation between the Chicago, Danville and Vincennes Railroad Company, and the Attica and Terre Haute Railroad Company, filed in the office of secretary of state of the State aforesaid, on the 11th day of May, A. D. 1872, as appeared from date of filing, endorsed thereon, and that it is a full, true, and complete transcript therefrom, and of the whole of said articles of consolidation.

In witness whereof I have hereunto set my hand and affixed the seal of the State, at the city of Indianapolis, this 13th day of May, A. D. 1872.

[SEAL.] JOHN H. FARQUHAR,
Secretary of State,
By I. M. EDDY, *Deputy.*

41 Filed in the office of the secretary of state of Illinois, at Springfield, May 10th, 1872.

NOTE.—The Attica and Terre Haute R. R. Co. was organized under the general laws of Indiana. Do not know date of filing of articles of association.

The above consolidation formed C., D. & V. R. R. Co. No. 4, which is the present company.

W. D. J.

November 30th, 1874.

EXHIBIT F.

Form of mortgage.

This indenture, made this twelfth day of March, in the year one thou-

sand eight hundred and seventy-two, between the Chicago, Danville and Vincennes Railroad Company, a corporation of the States of Illinois and Indiana, party of the first part, and William R. Fosdick and James D. Fish, of the city and State of New York, trustees, upon certain trusts hereinafter specified and provided, the party of the second part:

Whereas the Chicago, Danville and Vincennes Railroad Company, a corporation of the States of Illinois and Indiana, under and in pursuance of the provisions of the acts incorporating the same, has commenced to construct and put in operation that division of its railroad situate, lying, and being in the State of Indiana, commencing on the boundary line between said States of Illinois and Indiana, in the township of Marshfield and county of Warren, in the State of Indiana, at the point where it connects with the road of said party of the first part, terminating on the eastern boundary-line of the State of Illinois, in the town of Ross, in Vermillion County, in said last-named State, and distant about ten miles southeasterly from the village of Rossville, extending thence in a southeasterly direction to Covington, in Fountain County; thence southerly to Montezuma, in Parke County, and thence southeasterly to Brazil, in Clay County, on the line of the Terre Haute and Indianapolis Railroad; also, a branch road, extending from the main line before described, commencing at a point on said main line distant about three miles south from Covington, in Fountain County, and extending in an easterly direction to the village of Newburg, in said county, and is now engaged in constructing the same;

And, for the purpose aforesaid, needs and has resolved to purchase and transport iron rails, chairs, spikes, and other iron and materials necessary therefor, and engines, cars, and other rolling-stock and machinery to be used thereon, and to borrow a portion of the money necessary to make such purchases and to pay for such transportation, and the construction, completion, and equipment of said road;

And whereas at a meeting of the board of directors of the said
42 Chicago, Danville and Vincennes Railroad Company, the party of the first part, held pursuant to law, on the eleventh day of March, in the year 1872, the said board of directors resolved and enacted an order and resolutions as follows, to wit:

"Resolved, That, to aid in providing the means required for the construction and equipment of that division of this company's road situate, lying, and being in the State of Indiana, an issue of bonds shall be made by the company, amounting to one million and five hundred thousand dollars, each bond to be for the sum of $1,000, and to bear seven per cent. per annum interest, payable semi-annually, on the first days of April and October in each year, and the principal to be payable on the first day of April, 1912, and both principal and interest to be payable in United States gold coin, in the city of New York; and each bond to contain an express waiver of all recourse by the holder of the same to any individual liability of the stockholders of this company.

"That said bonds shall be dated as made on the twelfth day of March, A. D. 1872.

"In case default be made in the payment of any half year's interest on any of said bonds, and the warrant for said interest shall have been presented and its payment demanded, and such default shall have continued for six months after such demand, without the consent of the holder of said coupon or bond, then and thereupon the principal of all such bonds shall become immediately due and payable. That a warrant for each semi-annual payment of interest shall be made and authenti-

cated for and on behalf of this company by the secretary of this company and annexed to each bond. That said bonds shall be prepared by the president of the company, and signed by him for and on behalf of this company, and attested by the treasurer, and shall have annexed to them a certificate of authentication of the trustee or trustees under the mortgage made to secure them, and shall not be issued or obligatory without such certificate.

"That from and after the first day of April, A. D. 1876, and until the maturity of said bonds, there shall be annually created, paid, and deposited with a sinking-fund commissioner or commissioners, to be appointed by the board of directors, and to hold office at the pleasure of the board, a sinking-fund, to aid in the final redemption of said bonds, of an amount of money derived from the net earnings of said road and property, equal to one-half of one per cent. on the whole amount of said issue of bonds at the time of any such payment outstanding. Said fund, and all investments and accounts thereof, and its management, shall always be under the control of this board, and shall be from time to time continually invested by the commissioner or commissioners in the purchase of said bonds or bonds of the Government of the United States or of the States of Illinois and Indiana; and the interest on all such investments, as collected, shall be added to and continually compounded with
43 said fund, and the same shall be used and appropriated solely to redeem and eventually pay off said issue of bonds hereby provided to be made.

"No bond of said issue purchased by said fund shall thereby be canceled, but shall, with its coupons, be stamped as owned by said sinking-fund, and it, or its amount if destroyed, shall remain a liability against the company, and the interest shall be paid to the said sinking-fund the same as paid on other bonds, and shall be added to said fund, until the whole of said issue of bonds shall have been absorbed or otherwise paid off, when the whole issue shall be canceled. Any bonds of said issue which may be in said sinking-fund at any time may be destroyed by order of the board of directors of said company; but in such case the semi-annually accruing interest on the amount so destroyed must thereafter be paid to said sinking-fund. The bonds and securities belonging to the sinking-fund shall be kept in the office of the sinking-fund commissioner or commissioners, which shall be at or near the principal office of said railroad company.

"That for the purpose of securing the final payment of said issue of $1,500,000 of bonds, with all interest to accrue thereon, this company will make and deliver to William R. Fosdick and James D. Fish, as trustees, a mortgage and deed of trust, conveying to said persons as trustees, for the benefit of every holder of such bonds, or any of them, all that division of the road of this company situate, lying, and being in the State of Indiana, commencing on the boundary-line between the States of Illinois and Indiana, and in the township of Marshfield, and county of Warren, in the State of Indiana, at the point where it connects with the road of this company, terminating on the eastern boundary-line of the State of Illinois, in the town of Ross, in Vermil'ion County, in said last-named State, and distant about ten miles southeasterly from the village of Rossville; extending thence in a southeasterly direction to Covington, in Fountain County; thence southerly to Montezuma, in Park County; and thence southeasterly to Brazil, in Clay County, on the line of the Terre Haute and Indianapolis Railroad; also, a branch road, extending from the main line before described, commencing at a point on said main line distant about three miles south from Covington,

in Fountain County, and extending in an easterly direction to the village of Newburg, in said county, the entire length of road being about eighty miles; and also all such additional branch roads as this company may hereafter construct for the purpose of extending its tracks into the coal and mining regions in the vicinity of its said main lines of road, with all the property, rights, and franchises of this company of every kind and description whatever, pertinent to said road between said terminal points, and all the income to be had and derived from operating the same, in trust, to secure the final payment of said bonds as aforesaid, with all the rights, covenants, powers, and authority, in case default be made by this company in such payments as in said deed of trust
44 shall be specified, to foreclose said mortgage, and to sell the property so mortgaged, or to take possession of and operate the same, and receive the incomes thereof; but not in any case, before any default, to disturb or interfere with this company in the possession, control, and management thereof, or from receiving the incomes thereof, or from selling or exchanging any of the personal property, or machinery, or equipments thereof, or any of the lands or real estate, not necessary for the use and operation of the railroad; as to all of which, as will be in said mortgage and deed of trust specifically stated, agreed upon, and set forth.

"That the president of this company is hereby authorized and fully empowered to make and sign, and execute, and seal with the corporate seal of this company, the said mortgage and deed of trust, and to acknowledge the same for and on behalf of this company for record; and on the acceptance of said trust, and signing the said deed by the said trustees, to cause the same to be recorded according to law, and thereupon to make, sign, execute, and prepare said $1,500,000 of bonds for issue and sale, as shall be hereafter ordered by this board."

And whereas the said Chicago, Danville and Vincennes Railroad Company, party of the first part, hath, in accordance with the provisions of said order and resolution, made and executed bonds to the amount of one million and five hundred thousand dollars, of the form, denomination, and character prescribed by said order and resolution, and hold the same to be authenticated, issued, used, and disposed of for the purposes in said order and resolution stated:

Now, therefore, in further pursuance of said order and resolution, and to the end and purpose of securing and assuring the punctual payment of said one million and five hundred thousand dollars of bonds, and every part thereof which may be issued, to the persons who may become the holders of the same, or any of them:

This indenture witnesseth that the said Chicago, Danville and Vincennes Railroad Company, party of the first part, in consideration of all and singular the premises, and for the further consideration of one dollar to them in hand paid by the said party of the second part, trustees as aforesaid, at and before the ensealing hereof, the payment of which is hereby acknowledged, doth hereby grant, bargain, sell, enfeoff, release, assign, and convey unto the said William R. Fosdick and James D. Fish, trustees as aforesaid, party of the second part, and to their successors and assigns, all and singular the entire railroad of the party of the first part, situate, lying, and being in the State of Indiana, commencing on the boundary-line between the States of Illinois and Indiana, in the township of Marshfield, and county of Warren, in the State of Indiana, at the point where it connects with the road of the party of the first part, terminating on the eastern boundary-line of the State of
45 Illinois, in the town of Ross, in Vermilion County, in said last-

named State, and distant about ten miles southeasterly from the village of Rossville, extending thence in a southeasterly direction to Covington, in Fountain County; thence southerly to Montezuma, in Parke County, and thence southeasterly, to Brazil, in Clay County, on the line of the Terre Haute and Indianapolis Railroad; also, a branch road, extending from the main line before described, commencing at a point on said main line distant about three miles south from Covington, in Fountain County, and extending in an easte'ly direction to the village of Newburgh, in said county, the entire length of road being about eighty miles; and also all such additional branch roads as said party of the first part may hereafter construct, for the purpose of extending its tracks into the coal and mining regions in the vicinity of said main lines of road; with all its franchises, equipments, property, tolls, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods, and chattels, connected with or used in the using or operating of said railroad, or appurtenant thereto, and all its rails, ties, fuel, fencing, and erections, and all its rights of way and easements, and all cars, engines, and tools, and all rents, reservations, and reversions of every nature and kind whatever, including all the property between said terminal points which said party of the first part now has, or owns and possesses, or may hereafter acquire, either in law or equity, of every kind whatever, pertinent thereto.

Provided, however, that this grant and conveyance aforesaid shall not include nor operate to transfer any lands, goods, chattels, property, machinery, equipment, or other matters, which said company now owns, or may hereafter acquire, that need not be used for any purpose incident to the management or operation of said railway, or the repair thereof, or in the business of said railway company; nor any franchises, power, or corporate right to build that portion of the line of railroad which, by its charter, it is authorized to locate and construct, and not embraced within the terminal points hereinbefore described; but all which last mentioned franchises and right of way shall be wholly excepted and exempt from these presents and the grant and conveyance herein specified; nor shall these presents, in any way, prohibit the party of the first part from selling and conveying or otherwise disposing of the same, and all the proceeds thereof; nor from receiving, using, and applying any money or personal property of said company to the repairs of said road or its appurtenances, or to its current expenses, or to the purchase of necessary machinery, or the renewal thereof; and the board of directors of said company may likewise distribute and pay any net annual incomes and profits to stockholders, after paying the interest on the said bonds, and providing for any sinking fund required to be created and kept: To have and to hold the said railway property, premises, interests, rights, and appurtenances mentioned as aforesaid, and hereby conveyed, or intended so to be, by this conveyance, unto the said
46 party of the second part, as such trustees as aforesaid, and to their successors in said trust, or assigns, to and for the only use, benefit, and behoof of the said trustees, and their cestui que trust, their successors and assigns, forever; but in special trust and confidence, and upon the conditions following, that is to say:

1st. That this conveyance is for, and shall be by the said party of the second part, their successors and assigns, held, used, and owned solely for the benefit and protection and security of the persons and corporations who shall hold and own the bonds about to be issued as aforesaid, by the party of the first part, and for enforcing the stipulations of said company as to said issue of bonds, and the disposal thereof, and secur-

ing the same, and the final payment thereof, in their true intent and meaning, whether contained in said bonds, or the interest warrants attached to them, or in this deed.

2d. That for the better assuring and confirming the title and powers of the said party of the second part, their successors and assigns, in the said premises and property hereby conveyed, and in and to any premises and property or rights hereafter accruing, or to be acquired by said party of the first part, appurtenant to said railroad, which is intended to pass or be passed by this conveyance, the said party of the first part, their successors and assigns, will and shall, as often as may be lawfully required by the party of the second part, or their successors or assigns, holding the above granted trust, do such acts, and make such other and further conveyances and assurances in law as such party of the second part shall, by counsel learned in the law, be advised are necessary for the better carrying out of the object of the parties to this mortgage or deed of trust.

3d. That if the said party of the first part, their successors or assigns, shall well and truly pay to the holders of said one million and five hundred thousand dollars of bonds, so to be issued and hereby secured, the respective sums of money and interest due and accruing on said bonds on the days and times therein mentioned, and according to the tenor and effect of said bonds, then and thenceforth this indenture, and all the estate hereby granted, shall become and be utterly void and of no further effect; and the same shall be, by such payment, wholly annulled and satisfied, without any further receipt or entry of satisfaction of record whatever, but shall be, if required, entered and certified on any record of the same as so satisfied by the party of the second part or their successors.

4th. That until default shall have been made by the party of the first part in the payment of principal or interest of the said bonds or some of them, or until default shall have been made in respect to something herein required to be done by the said party of the first part, the said party of the first part shall be suffered and permitted to possess, use, occupy, manage, and operate the said railroad, property and franchises and appurtenances, and to renew, replace, and repair the same, and
47 every part thereof, and take and receive and use the tolls, rents, issues, incomes, and profits thereof, and dispose of the same in any manner not inconsistent with this instrument.

5th. In case default shall be made in the payment of any interest on any of the aforesaid bonds issued or to be issued, according to the tenor of the coupons thereto annexed, or of the provisions hereof; or in case default shall be made in the payment of the principal of said bonds, or any of them, when the same shall become due, without the consent of the holder of such bond on which such default shall occur, the said party of the first part hereby covenants and agrees to and with the party of the second part, and their successors and assigns, that within six months after such default shall have occurred, the same default still continuing, the said party of the first part, on demand of the said trustee or trustees for the time being, shall and will surrender to him or them, or to their agent, the actual possession of the herein granted and demised railroad and premises, together with all the books, records, papers, accounts, and money of said company, and all management and control thereof; and that all the expenses of taking, holding, managing, and operating said property, if possession be so taken, shall be paid from the income and profits thereof; and if said property shall, after such taking possession thereof, be sold, then from the sale thereof; or such

expenses may be paid from the sale of any personal property, as the said trustees may deem proper; and that said party of the second part, and their successors, having tak*ing* such possession, may manage, operate, and control said road and property and all of its affairs, and appoint all needful agents and employees for that purpose, and pay the same, and receive all the incomes, issues, and profits thereof, and apply the same to the payment of the said interest so in default, according to the true intent and tenor of the said bonds and the coupons annexed and to the terms of this deed, until such default shall have been satisfied, if such incomes and profits will satisfy the same—first paying all expenses of such possession and management, and all taxes, assessments, and charges on said property, and a just compensation for their own services as such trustees. But in any and all cases of such taking of possession by said party of the second part, and paying up any such default, and the expenses aforesaid, the said party of the second part shall immediately thereafter redeliver the said railway and premises, books, records, and money and accounts into the possession of the party of the first part; provided, that no such demand for such possession shall be made by said trustee or trustees until they shall have been required by the holders of at least the one-half of all of the said issue of bonds which shall then be unpaid and outstanding to make such demand, and to take such possession of said road and property.

6th. That in case default shall be made as aforesaid, and shall continue as aforesaid, it shall be lawful for the party of the second
48 part, or their successors in said trust, after entry as aforesaid, or other entry, or without entry, personally, or by agent or attorney, to sell and dispose of, to the highest bidder, all and singular the premises hereby conveyed, or intended so to be, as an entirety, at public auction, in the city of Indianapolis, State of Indiana, at such time as said party of the second part may appoint, first having demanded of the party of the first part full payment of all money then in default, and also first having given sixty days' notice of such time and place of sale, and a full description of the property so to be sold, by advertisement thereof in two newspapers; one published in Indianapolis, in the State of Indiana, and one published in the city of New York; and to adjourn said sale from time to time, in their discretion, and, if adjourned, to make such sale in manner aforesaid, without further notice, at the time and place to which it may be so adjourned; and upon such sale, and receiving the purchase money therefor, to convey the same, by good and sufficient conveyances, to the purchaser or purchasers; and such sale and conveyance so made shall convey all the right, title, estate, interest, and property of the said party of the first part, of, in, and to the said road, premises, franchises, and property to the said purchaser, in fee simple, forever; and shall be a perpetual bar, both in law and equity, against the said party of the first part, and their successors and assigns, and against all and every person claiming or to claim the said premises, or any part thereof, under them, forever. After deducting from the proceeds of such sale the expenses of the sale and conveyance, and all advances or liabilities which may have been made or incurred by the party of the second part in operating and controlling and maintaining the said railroad and property, and in managing its business and affairs while in possession, and all payments for taxes, charges, and assessments on said premises, or any part thereof, as well as reasonable compensation for their own services, to apply the proceeds of such sale to the payment of the interest of said one million and five hundred thousand dollars of bonds, or so many of them as shall have been issued

by said party of the first part, and be then outstanding, pro rata, until all such interest shall be paid, and afterwards to apply the remainder to the payment of the principal of said bonds, pro rata, until such principal shall be paid; and if any surplus remain after paying all of said matters, to pay such surplus to the party of the first part; and such payments shall be so made on said bonds, whether the same shall have become due or not at the time of such sale: Provided, That said trustee or trustees may, in their discretion, sell the said premises as an entirety, and in doing so shall make legal distribution of the proceeds of such sale accordingly.

It is hereby declared that the receipt of said trustee or trustees making any such sale to the purchaser of the premises for the purchase-money shall be a full and sufficient discharge of such purchaser therefor, and that said purchaser shall not, after payment of said purchase-money, and obtaining such receipt therefor, be liable, or in any
49 way bound, to see said purchase-money applied to this trust, or otherwise, or in any manner answerable for its loss or misapplication, or obliged to inquire into the authority for making such sale.

7th. At any sale of the property aforesaid, or any part thereof, made by virtue of these presents, or by judicial authority, the said trustee or trustees may bid for and purchase, or cause to be purchased, the property so sold or any part of it, in behalf of the holders of said bonds secured by this deed then outstanding, at a reasonable price if only a part be sold; but if the whole property be sold, at a price not exceeding the whole amount of said bonds and interest then outstanding.

8th. If default be made by the party of the first part in the payment of any half-year's interest on any of said bonds and the warrant or coupon for such interest shall have been presented and its payment demanded, and such default shall have continued six months after such demand, without the consent of the holder of such coupon or bond, then and thereupon the principal of all of the said bonds hereby secured shall be and become immediately due and payable, anything in such bonds to the contrary notwithstanding; and the said party of the second part may so declare the same, and notify the party of the first part thereof, and upon the written request of the holders of the majority of the said bonds then outstanding shall proceed to collect both principal and interest of all such bonds outstanding, by foreclosure and sale of said property, or otherwise, as herein provided.

9th. It is hereby mutually agreed by the parties hereto that the trustees shall be responsible only for gross negligence and willful default, and that they shall not be bound to do any act touching the execution of the trust, except at their own option, which may involve them in personal expense or liability, unless first duly and satisfactorily indemnified against the same by one or more of said bondholders.

In case of the death, resignation, or inability to act of any trustee, the board of directors may appoint a successor, and failing to so appoint, any court of competent jurisdiction may appoint a trustee to fill such vacancy on the application of the holders of the one-sixth part of the bonds hereby intended to be secured then outstanding, and such appointment by the board or by such court shall invest the trustee so appointed with all the interest, estate, power, and authority in the premises, and subject him or them to the same obligations hereby given and granted to the party of the second part herein.

And the said party of the first part hereby further covenants and agrees with the party of the second part and their successors, and with the holders of each and all of the said issue of one million and five hun-

dred thousand dollars of bonds which may be issued, that the said party of the first part will create and make a sinking fund for the re-
50 demption of such bonds and each of them, by setting aside and depositing with a sinking-fund commissioner or commissioners, to be appointed by the party of the first part for that purpose, from and after the first day of April, in the year 1876, and annually thereafter until the maturity of said bonds, from the net earnings of the said road and property, after the payment of all the interest on said bonds, an amount of money equal to the one-half of one per cent. of the principal amount of all such bonds hereby secured which shall then be outstanding. Such sinking-fund moneys shall from time to time, under the orders of the party of the first part, be invested in the purchase of the bonds so issued, or in bonds of the Government of the United States or of the States of Illinois and Indiana, and the money accruing on any and all of such investments for interest, as fast as the same shall be received, shall be added to and paid into the sinking fund, and compounded therein continually, and reinvested, in like manner with the other money of said fund, and the same shall be used solely to redeem and eventually pay off said bonds herein and hereby secured.

That the board of directors of said railway company, party of the first part, shall have entire control over the management of said sinking fund, and every person in charge of or connected with the same, and shall, from time to time, direct in what bonds or securities it shall be invested, and at what prices or rates, and how it shall be kept, and the manner of keeping the accounts thereof; and shall require ample security to be given to them by any person in charge of its moneys, or its securities or bonds, for its safe-keeping.

Every bond of the said issue which may be purchased and held by said sinking fund shall remain in full force until the whole of such issue shall have matured or shall have been so absorbed, or otherwise redeemed, by said party of the first part, or until canceled, as hereinafter provided; and the interest on such bonds held by said sinking fund shall be paid by said railroad company regularly, as the interest on its other similar bonds is paid; and such bonds so in the sinking fund shall, as to the annual amount of money to be paid from net earnings into said fund, be regarded as outstanding.

At the annual meeting of the stockholders, in the year 1877, and at each annual meeting thereafter, all bonds of said issue, and the coupons thereon then being in the sinking fund, purchased by said fund as aforesaid, shall be withdrawn from said fund, and canceled, and so certified by the commissioner and treasurer of the company, and the signatures thereto mutilated; and in place thereof the treasurer of the company shall give to the commissioner a receipt therefor, specifying the same, and such cancellation; which receipt shall be filed in the office of said fund, and shall, semi-annually, draw and entitle said sinking fund to the same amount of interest as the bonds so canceled would have done, and for the same purposes.

51 It is understood and agreed by and between the parties hereto that no individual liability shall attach to any stockholders of the party of the first part in behalf of the holders of any of the bonds secured by this mortgage or deed of trust, and that the holders of said bonds rely solely on the property, rights, and franchises of the party of the first part covered by this mortgage, and the stipulations and covenants of the said party of the first part herein contained, for the payment of the principal and interest of the bonds so held by them.

In witness whereof the said Chicago, Danville and Vincennes Rail-

road Company, the party of the first part, has caused these presents to be executed and signed by the president of their company, and attested by their secretary, in their behalf and for the said company, and has caused the corporate seal of the company to be hereto affixed, the day and year first above written. And the parties of the second part have hereunto set their hands and affixed their seals, the same day and year aforesaid.

CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY,
By W. D. JUDSON, *President.*

Executed in presence of—
RICH'D N. WHITLOCK.
H. A. GILDERSLEEVE.

[SEAL.] J. S. CAMPBELL, *Secretary.*

WM R. FOSDICK, [SEAL.]
JAMES D. FISH, [SEAL.]
Trustees.

STATE OF NEW YORK,
City and County of New York, ss:

Before me, the undersigned, a notary public of the State of New York, in the city of New York, duly commissioned and qualified, came this day William D. Judson, to me personally known, and also known by me to be the president of the Chicago, Danville and Vincennes Railroad Company, the party of the first part in the above deed of trust, and who executed the same on behalf of said company, and acknowledged that the said railroad company, and he, as the president of said company, and in its behalf, did sign, seal, and deliver the said indenture and deed of trust, as and for its own act and deed, and for the uses and purposes therein mentioned. Also personally appeared before me, at the same time, the above-named William R. Fosdick, one of the trustees, and one of the parties of the second part in the foregoing mortgage and deed of trust, and personally known to me as the person who signed the same as such, and acknowledged that he did sign, seal, and execute the same, for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this thirteenth day of March, anno Domini 1872.

[SEAL.] H. A. GILDERSLEEVE,
Notary Public, New York City and County.

52 STATE OF ILLINOIS,
County of Cook, ss:

Before me, the undersigned, a notary public of the State of Illinois, in the county of Cook, in the city of Chicago, duly commissioned and qualified, came James D. Fish, to me personally known, and one of the trustees, and one of the parties of the second part in the foregoing mortgage and deed of trust, and personally known to me as the person who signed the same as such, and acknowledged that he did sign, seal, and execute the same, for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this 15th day of March, anno Domini 1872.

[SEAL.] JOHN B. ADAMS,
Notary Public, in the City of Chicago and County of Cook.

53 EXHIBIT G.

Consolidated mortgage.

This indenture, made this twenty-fourth day of April, in the year one thousand eight hundred and seventy-two, between the Chicago, Danville and Vincennes Railroad Company, a corporation of the States of Illinois and Indiana, party of the first part, and William R. Fosdick and James D. Fish, of the city and State of New York, trustees, upon certain trusts hereinafter specified and provided, the party of the second part.

Whereas the Chicago, Danville and Vincennes Railroad Company has heretofore issued, sold, and disposed of two thousand and five hundred of its first-mortgage bonds, of one thousand dollars each, numbered from number one (1) to two thousand and five hundred (2,500), both inclusive, amounting in the aggregate to two millions and five hundred thousand dollars, which bonds are dated the tenth day of March, A. D. 1869, are due and payable on the first day of April, A. D. 1909, with semi-annual interest coupons attached thereto, payable on the first days of April and October in each year, until the maturity of said bonds, and both principal and interest payable in United States gold coin, and all of which bonds are now outstanding and unpaid;

And whereas said corporation, in order to secure the payment of the principal and interest of the said two millions and five hundred thousand dollars of bonds, did, under date of the tenth day of March, A. D. 1869, aforesaid, make and execute a certain mortgage or deed of trust to William R. Fosdick and James D. Fish, trustees, conveying to them, as said trustees, that division of the road of said corporation, situate, lying, and being in the counties of Cook, Will, Kankakee, Iroquois, and Vermilion, in the State of Illinois, together with certain other property of said corporation, reference being had to the mortgage or deed of trust aforesaid, which is recorded in the several counties mentioned therein, for a more full description of the premises and property so conveyed, and embraced in said deed of trust, and for all other and further provisions contained therein;

And whereas the Chicago, Danville and Vincennes Railroad Company have made and executed certain other of its first-mortgage bonds, of one thousand dollars each, numbered from number two thousand five hundred and one (2,501) to four thousand (4,000), both inclusive, amounting in the aggregate to one million and five hundred thousand dollars, which bonds are dated on the 12th day of March, A. D. 1872, are due and payable on the first day of April, A. D. 1912, with semi-annual interest coupons attached thereto, payable on the first days of

54 April and October in each year, until the maturity of said bonds, and both principal and interest payable in United States gold coin, and which bonds said company are now about to sell and dispose of for the purpose of providing a portion of the means required for the construction and equipment of that division of its road situate in the State of Indiana;

And whereas said corporation, in order to secure the payment of the principal and interest of said last-mentioned one million and five hundred thousand dollars of bonds, did, under date of the twelfth day of March, A. D. 1872, aforesaid, make and execute a certain other mortgage or deed of trust to William R. Fosdick and James D. Fish, trustees, conveying to them, as said trustees, that division of the road of said corporation, situate, lying and being in the counties of Warren, Fountain, Parke, and Clay, in the State of Indiana, together with certain other

property of said corporation, reference being had to the mortgage or deed of trust aforesaid, which is recorded in the several counties mentioned therein, for a more full description of the premises and property so conveyed and embraced in said deed of trust, and for all other and further provisions contained therein:

Now, for the purpose of more fully securing and assuring the punctual payment of the said two millions and five hundred thousand dollars of bonds, before mentioned, numbered from number 1 to number 2,500, both inclusive, and dated the tenth day of March, A. D. 1869, and due and payable on the first day of April, A. D. 1909, and every part thereof, and the interest thereon, to the persons who may become the holders of the same, or any of them:

This indenture witnesseth that the said Chicago, Danville and Vincennes Railroad Company, party of the first part, in consideration of all and singular the premises, and for the further consideration of one dollar to them in hand paid by the said party of the second part, trustees as aforesaid, at and before the ensealing hereof, the payment of which is hereby acknowledged, in addition to the conveyance made by it to said party of the second part, by the indenture aforesaid, dated March 10, A. D. 1869, doth hereby grant, bargain, sell, enfeoff, release, assign, and convey unto the said William R. Fosdick and James D. Fish, trustees as aforesaid, party of the second part, and to their successors and assigns, all and singular the entire division of the railroad of the party of the first part, situate, lying, and being in the State of Indiana, commencing on the boundary line between the States of Illinois and Indiana, in the township of Marshfield and county of Warren, in the State of Indiana, at the point where it connects with the road of the party of the first part, terminating on the eastern boundary-line of the State of Illinois, in the town of Ross, in Vermilion County, in said last-named State, and distant about ten miles southeasterly from the village of Rossville, extending thence in a southeasterly direction to Covington, in Fountain County; thence southerly, to Montezuma, in Parke County, and thence southeasterly, to Brazil, in Clay County, on the line of the Terre Haute and Indianapolis Railroad. Also, a branch road extending from the main line before described, commencing at a point on said main line distant about three miles south from Covington, in Fountain County, and extending in an easterly direction to
55 the village of Newburg, in said county, the entire length of road being about eighty miles; and also all such additional branch roads as said party of the first part may hereafter construct in the State of Indiana, for the purpose of extending its tracts into the coal and mining regions in the vicinity of said main lines of road; with all its franchises, equipments, property, tolls, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods, and chattels, connected with or used in the using or operating of said railroad, or appurtenant thereto, and all its rails, ties, fuel, fencing, and erections, and all its rights of way and easements, and all cars, engines, and tools, and all rents, reservations, and reversions of every nature and kind whatever, including all the property between said terminal points which said party of the first part now has or owns and possesses, or may hereafter acquire, either in law or equity, of every kind whatever pertinent thereto.

To have and to hold the said railway property, premises, interests, rights, and appurtenances mentioned as aforesaid, and hereby conveyed, or intended so to be, by this conveyance, unto the said party of the second part, as such trustees as aforesaid, and to their successors in said

trust, or assigns, to and for the only use, benefit, and behoof of the said trustees, and their cestui que trust, their successors and assigns, forever; subject, however, to the prior lien provided for in a certain mort'age or deed of trust made by the party of the first part hereto to the party of the second part hereto, dated March 12th, 1872, to secure one million and five hundred thousand dollars of bonds, to be issued by the party of the first part, and hereinbefore referred to.

And for the purpose of more fully securing and assuring the punctual payment of the said one million and five hundred thousand dollars of bonds before mentioned, numbered from number 2501 to number 4000, both inclusive, and dated the 12th day of March, A. D. 1872, and due and payable on the first day of April, A. D. 1912, and every part thereof, and the interest thereon, to the persons who may become the holders of the same, or any of them.

This indenture further witnesseth that the said Chicago, Danville and Vincennes Railroad Company, party of the first part, in consideration of all and singular the premises, and for the further consideration of one dollar to them in hand paid by the said party of the second part, trustees as aforesaid, at and before the ensealing hereof, the payment of which is hereby acknowledged, in addition to the conveyance made by it to said party of the second part by the indenture aforesaid, dated March 12th, A. D. 1872, doth hereby grant, bargain, sell, enfeoff, release, assign, and convey unto the said William R. Fosdick and James D. Fish, trustees as aforesaid, party of the second part, and to their successors and assigns, all and singular the entire railroad of the party of the first part, lying, being, and extending from its terminus, in the city of Chicago, in Cook County, Illinois, southerly through the counties of Cook, Will, Kankakee, Iroquois, and Vermilion, to the city of Danville, being in length about one hundred and thirty miles, with all its franchises,
56 equipments, property, tolls, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods, and chattels, connected with or used in the using or operating of said railroad, or appurtenant thereto, and all its rails, ties, fuel, fencing, and erections, and all its rights of way and easements, and all cars, engines, and tools, and all rents, reservations, and reversions, of every nature and kind whatever, including all the property between said terminal points which said party of the first part now has or owns and possesses, or may hereafter acquire, either in law or equity, of every kind whatever pertinent thereto: To have and to hold the said railway property, premises, interests, rights, and appurtenances mentioned as aforesaid, and hereby conveyed, or intended so to be, by this conveyance, unto the said party of the second part, as such trustees aforesaid, and to their successors in said trust, or assigns, to and for the only use, benefit, and behoof of the said trustees, and their cestui que trust, their successors and assigns, forever; subject, however, to a prior lien provided for in a certain mortgage or deed of trust made by the party of the first part hereto to the party of the second part hereto, dated March 10th, A. D. 1869, to secure two millions and five hundred thousand dollars of bonds issued by the party of the first part, and hereinbefore referred to.

It is provided, however, that the grants and conveyances hereinbefore contained shall not include, nor operate to transfer, any lands, goods, chattels, property, machinery, equipment, or other matters which said company now owns, or may hereafter acquire, that need not be used for any purpose incident to the management or operation of said railway, or the repair thereof, or in the business of said railway company; nor any franchises, power, or corporate right to build that

portion of the line of railroad which by its charter it is authorized to locate and construct, and not embraced within the terminal points herein before described; but all which last mentioned franchises and right of way shall be wholly excepted and exempt from these presents and the grant and conveyance herein specified; nor shall these presents in any way prohibit the party of the first part from selling and conveying, or otherwise disposing of the same, and all the proceeds thereof; nor from receiving, using, and applying any money or personal property of said company to the repairs of said road or its appurtenances, or to its current expenses, or to the purchase of necessary machinery, or the renewal thereof; and the board of directors of said company may likewise distribute and pay any net annual incomes and profits to stockholders, after paying the interest on the said bonds, and providing for any sinking fund required to be created and kept. It is further provided, that all the property herein and hereby conveyed to the party of the second part shall be held by them in special trust and confidence, and upon the conditions following, that is to say:

1st. That these conveyances are for, and shall be, by the said party of the second part, their successors and assigns, held, used, and owned solely for the benefit and protection and security of the persons and corporation who shall hold and own the bonds issued as aforesaid by the party of the first part, and for enforcing the stipulations of said company as to said issue of bonds, and the disposal thereof, and securing the same, and the final payment thereof, in their true intent and meaning, whether contained in said bonds, or the interest-warrants attached to them, or in this deed.

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2d. That for the better assuring and confirming the title and powers of the said party of the second part, their successors and assigns, in the said premises and property hereby conveyed, and in and to any premises and property or rights hereafter accruing, or to be acquired by said party of the first part, appurtenant to said railroad, which is intended to pass or be passed by this conveyance, the said party of the first part, their successors and assigns, will and shall, as often as may be lawfully required by the party of the second part, or their successors or assigns, holding the above granted trust do such acts, and make such other and further conveyances and assurances in law as such party in the second part shall, by counsel learned in the law, be advised are necessary for the better carrying out of the object of the parties to this mortgage or deed of trust.

3d. That if the said party of the first part, their successors or assigns, shall well and truly pay to the holders of said bonds, so issued and secured, the respective sums of money and interest due and accruing on said bonds on the days and times therein mentioned, and according to the tenor and effect of said bonds, then and thenceforth this indenture, and all the estate hereby granted, shall become and be utterly void and of no further effect; and the same shall be, by such payment, wholly annulled and satisfied, without any further receipt or entry of satisfaction of record whatever, but shall be, if required, entered and certified on any record of the same as so satisfied by the party of the second part or their successors.

4th. That until default shall have been made by the party of the first part in the payment of principal or interest of the said bonds, or some of them, or until default shall have been made in respect to something herein required to be done by the said party of the first part, the said party of the first part shall be suffered and permitted to possess, use, occupy, manage, and operate the said railroad, property, and franchises,

and appurtenances, and to renew, replace, and repair the same, and every part thereof, and take and receive and use the tolls, rents, issues, incomes, and profits thereof, and dispose of the same in any manner not inconsistent with this instrument.

5th. In case default shall be made in the payment of any interest on any of the aforesaid bonds issued or to be issued, according to the tenor of the coupons thereto annexed, or of the provisions hereof; or in case default shall be made in the payment of the principal of said bonds, or any of them, when the same shall become due, without the consent of the holder of such bond on which such default shall occur, the said party of the first part hereby covenants and agrees to and with the party of the second part, and their successors and assigns, that within six months after such default shall have occurred, the same default still continuing, the said party of the first part, on demand of the said trustee or trustees for the time being, shall and will surrender to him
58 or them, or to their agent, the actual possession of the herein granted and demised railroad and premises, together with all the books, records, papers, accounts, and money of said company, and all management and control thereof; and that all the expenses of taking, holding, managing, and operating said property, if possession be so taken, shall be paid from the incomes and profits thereof; and if said property shall, after such taking possession thereof, be sold, then from the sale thereof; or such expenses may be paid from the sale of any personal property, as the said trustees may deem proper; and that said party of the second part, and their successors, having taken such possession, may manage, operate, and control said road and property and all of its affairs, and appoint all needful agents and employees for that purpose, and pay the same, and receive all the incomes, issues, and profits thereof, and apply the same to the payment of said interest so in default, according to the true intent and tenor of the said bonds and the coupons annexed, and to the terms of this deed, until such default shall have been satisfied, if such incomes and profits will satisfy the same; first paying all expenses of such possession and management, and all taxes, assessments, and charges on said property, and a just compensation for their own services as such trustees. But in any and all cases of such taking of possession by said party of the second part, and paying up any such default, and the expenses aforesaid, the said party of the second part shall immediately thereafter redeliver the said railway and premises, books, records, and money and accounts into the possession of the party of the first part: Provided, that no such demand for such possession shall be made by said trustee or trustees until they shall have been required by the holders of at least the one-half of all of the said issue of bonds which shall then be unpaid and outstanding to make such demand, and to take such possession of said road and property.

6th. That in case default shall be made as aforesaid, and shall continue as aforesaid, it shall be lawful for the party of the second part, or their successors in said trust, after entry as aforesaid, or other entry, or without entry, personally, or by agent or attorney, to sell and dispose of, to the highest bidder, all and singular the premises hereby conveyed, or intended so to be, at public auction in the city of Chicago, in the State of Illinois, or in the city of Indianapolis, in the State of Indiana, at such time as said party of the second part may appoint, first having demanded of the party of the first part full payment of all money then in default, and also first having given sixty days' notice of such time and place of sale, and a full description of the property so to be sold, by advertisement thereof in three newspapers, one published in Chicago

in the State of Illinois, one published in Indianapolis in the State of Indiana, and one published in the city of New York; and to adjourn said sale from time to time in their discretion; and, if adjourned, to make such sale in manner aforesaid, without further notice, at the time and place to which it may be adjourned; and upon such sale, and receiving the purchase-money therefor, to convey the same, by good and sufficient conveyances, to the purchaser or purchasers; and such sale and conveyance, so made, shall convey all the right, title, estate, inter-
59 est, and property of the said party of the first part, of, in, and to the said road, premises, franchises, and property to the said purchaser, in fee simple, forever; and shall be a perpetual bar, both in law and equity, against the said party of the first part, and their successors and assigns, and against all and every person claiming or to claim the said premises, or any part thereof, under them, forever. After deducting from the proceeds of such sale the expenses of the sale and conveyance, and all advances or liabilities which may have been made or incurred by the party of the second part in operating and controlling and maintaining the said railroad and property, and in managing its business and affairs while in possession, and all payments for taxes, charges, and assessments on said premises, or any part thereof, as well as reasonable compensation for their own services, to apply the proceeds of such sale to the payment of the interest on said bonds, or so many of them as shall have been issued by said party of the first part, and be then outstanding, pro rata, until all such interest shall be paid, and afterwards to apply the remainder to the payment of the principal of said bonds, pro rata, until such principal shall be paid: and if any surplus remain after paying all of said matters, to pay such surplus to the party of the first part; and such payments shall be so made on said bonds, whether the same shall have become due or not at the time of such sale.

It is hereby declared that the receipt of said trustee or trustees, making any such sale to the purchaser of the premises for the purchase money, shall be a full and sufficient discharge of such purchaser therefor, and that said purchaser shall not after payment of said purchase money, and obtaining such receipt therefor, be liable, or in any way bound, to see said purchase money applied to this trust, or otherwise, or in any manner answerable for its loss or misapplication, or obliged to inquire into the authority for making such sale.

7th. At any sale of the property aforesaid, or any part thereof, made by virtue of these presents, or by judicial authority, the said trustee or trustees may bid for and purchase, or cause to be purchased, the property so sold, or any part of it, in behalf of the holders of said bonds secured by this deed then outstanding, at a reasonable price, if only a part be sold; but, if the whole property be sold, at a price not exceeding the whole amount of said bonds and interest then outstanding.

8th. If default be made by the party of the first part in the payment of any half year's interest on any of said bonds, and the warrant or coupon for such interest shall have been presented, and its payment demanded, and such default shall have continued six months after such demand, without the consent of the holder of such coupon or bond, then and thereupon the principal of all of the said bonds hereby secured shall be and become immediately due and payable, anything in such bonds to the contrary notwithstanding; and the said party of the second part may so declare the same, and notify the party of the first part thereof, and upon the written request of the holders of a majority of the said bonds then outstanding shall proceed to collect both principal and

interest of all such bonds outstanding, by foreclosure and sale of said property or otherwise, as herein provided.

9th. It is hereby mutually agreed by the parties hereto that
60 the trustees shall be responsible only for gross negligence and willful default, and that they shall not be bound to do any act touching the execution of the trust, except at their own option, which may involve them in personal expense or liability, unless first duly and satisfactorily indemnified against the same by one or more of said bondholders.

In case of the death, resignation, or inability to act of any trustee, the board of directors may appoint a successor, and, failing to so appoint, any court of competent jurisdiction may appoint a trustee to fill such vacancy, on the application of the holders of the one-sixth part of the bonds hereby intended to be secured then outstanding, and such appointment by the board or by such court shall invest the trustee so appointed with all the interest, estate, power, and authority in the premises, and subject him or them to the same obligations hereby given and granted to the party of the second part herein.

The foregoing grants, conveyances, and covenants in this indenture contained, are made and entered into by the Chicago, Danville and Vincennes Railroad Company, party of the first part hereto, upon the express understanding, agreement, and condition, that in case the party of the first part, or its successors or assigns, shall deem it necessary or desirable, at any future time, in consequence of an increase of the traffic of the said railroad, to issue and dispose of any amount of bonds, or other evidences of indebtedness, for the purpose of providing the means for the purchase of additional rolling-stock and equipment for the use of said railroad or of said company, its successors or assigns, or for the improvement of said railroad or property, that then, and in that case, the said Chicago, Danville and Vincennes Railroad Company, its successors or assigns, may secure the payment of the principal and interest of such bonds or other evidences of indebtedness so issued and disposed of, by mortgage upon all the roads and property of said company hereinbefore mentioned and described, and that such mortgage, when so made and executed, shall constitute and be and become a lien upon all said roads and property prior to, and having precedence of, the liens hereinbefore provided for by this instrument.

In witness whereof the said Chicago, Danville and Vincennes Railroad Company, the party of the first part, has caused these presents to be executed and signed by the president of their company, and attested by their secretary, in their behalf and for the said company, and has caused the corporate seal of the company to be hereto affixed, the day and year first above written. And the parties of the second part have hereunto set their hands and affixed their seals the same day and year aforesaid.

[SEAL.] CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY,
By W. D. JUDSON, *President.*

Attest, J. S. CAMPBELL, *Secretary.*
WM F. FOSDICK, [SEAL.]
JAMES D. FISH, [SEAL.]
Trustees.

61 STATE OF NEW YORK,
City and County of New York, ss:

Before me, the undersigned, a notary public of the State of New York, in the city of New York, duly commissioned and qualified, came

this day William D. Judson, to me personally known, and also known by me to be the president of the Chicago, Danville and Vincennes Railroad Company, the party of the first part in the above deed of trust, and who executed the same on behalf of said company, and acknowledged that the said railroad company, and he, as the president of said company, and in its behalf, did sign, seal, and deliver the said indenture and deed of trust, as and for its own act and deed, and for the uses and purposes therein mentioned.

Also personally appeared before me, at the same time, the above-named William R. Fosdick and James D. Fish, trustees, and the party of the second part in the foregoing mortgage and deed of trust, and personally known to me as the persons who signed the same as such, and acknowledged that they did sign, seal, and execute the same, for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this twenty-fifth day of April, anno Domini 1872.

[SEAL.] J. A. WELCH,
Notary Public, New York City and County.

62 EXHIBIT H.

Certificate of indebtedness of the Chicago, Danville and Vincennes Railroad Co.

Principal and interest payable in United States gold coin.

$.] [No. .

The Chicago, Danville and Vincennes Railroad Company acknowledges itself indebted to , or bearer, dollars, payable on the first day of February, 1879, with interest from and after February 1st, 1874, at seven per cent. per annum, payable semi-annually, on the first days of February and August in each year, at the office or agency of said company, in the city of New York, on the delivery of the annexed interest warrants at such place as may be designated by said company, by advertisement published in said city, and both principal and interest payable in United States gold coin.

This certificate is issued by the Chicago, Danville and Vincennes Railroad Company in exchange for a like amount of interest coupons from its first-mortgage bonds, maturing in equal proportions on the following dates, viz: October 1st, 1873, April 1st, 1874, October 1st, 1874, and April 1st, 1875, from bonds numbered as specified in the trustee's certificate hereto attached, for the purpose of deferring the payment of said coupons until the maturity of this certificate. The coupons aforesaid having been deposited in trust with William R. Fosdick, trustee, for the benefit, protection, and security of the holder hereof.

It is agreed on the part of said Chicago, Danville and Vincennes Railroad Company, that in case of the non-payment of the interest hereon on demand, at any time when due, or in case of the non-payment of the coupons from its first-mortgage bonds, maturing October 1st, 1875, and on the first days of April and October in each succeeding year, until the payment of this certificate, or in case of the non-payment of the principal of this certificate at maturity, that the holder hereof, in such case, shall be entitled to demand of and receive from the trustee above named the interest-coupons hereinbefore mentioned, with all their rights to proceed against the company, upon the surrender of this certificate to said trustee.

In testimony whereof the said company have caused the foregoing to be attested on its behalf by its president and treasurer, and its corporate seal to be affixed hereto, at the city of Chicago, in the State of Illinois, this twentieth day of November, 1873.

President.

Treasurer.

I hereby certify that I have received interest coupons from the first-mortgage bonds of the Chicago, Danville and Vincennes Railroad Company, number , amounting to dollars, as stated in the above certificate of indebtedness, which I hold in trust, upon the terms and conditions above expressed.

Trustee.

[S .

The Chicago, Danville & Vincennes Railroad Company will pay the bearer, at its agency in the city of New York, dollars, in coin, on the first day of February, 1879, for semi-annual interest on its "certificate of indebtedness."

No. .

Treasurer.

63 EXHIBIT I.

Mortgage to secure convertible mortgage bonds.

FORM OF MORTGAGE.

This indenture, made this sixteenth day of December, in the year one thousand eight hundred and seventy-two, between the Chicago, Danville and Vincennes Railroad Company, a corporation of the States of Illinois and Indiana, party of the first part, and James D. Fish and James W. Elwell, of the city and State of New York, trustees, upon certain trusts hereinafter specified and provided, the party of the second part:

Whereas the Chicago, Danville and Vincennes Railroad Company, a corporation of the States of Illinois and Indiana, under and in pursuance of the provisions of the acts incorporating the same, are constructing and operating a railroad in said States, commencing at the city of Chicago, and extending southerly through the counties of Cook, Will, Kankakee, Iroquois, and Vermillion, in Illinois, to the city of Danville, and also extending from a point on the line above described, distant about twelve miles north of Danville aforesaid, in a southeasterly direction, to the boundary-line of the State of Indiana, and thence in said last-named State in a southeasterly direction to Covington, in Fountain County; thence southerly to Montezuma, in Parke County, and thence southeasterly to Brazil, in Clay County, on the line of the Terre Haute and Indianapolis Railroad; also, a branch road, extending from the main line before described, commencing at a point on said main line distant about three miles south from Covington, in Fountain County, and extending in an easterly direction to the village of Newburg, in said county; and is now engaged in constructing and operating the same.

And whereas at a meeting of the board of directors of the said Chicago, Danville and Vincennes Railroad Company, the party of the first

part, held pursuant to law, on the fourteenth day of December, in the year one thousand eight hundred and seventy-two, the said board of directors resolved and enacted an order and resolution as follows, to wit:

"Whereas in consequence of an increase of the traffic of this company's road it has become necessary to provide the means for the purchase of additional rolling-stock and equipment for the use of the company, and for the improvement of the company's road and property: Therefore,

"Resolved, That an issue of bonds shall be made by the company, designated 'Convertible mortgage bonds,' amounting to one million of dollars, eight hundred of said bonds to be for the sum of $1,000 each, and four hundred of said bonds to be for the sum of $500 each, all of said bonds to bear seven per cent. per annum interest, payable semi-an-
64 nually on the first days of February and August in each year, and the principal to be payable on the first day of February, 1893, and both principal and interest to be payable in United States gold coin, in the city of New York; each bond to be convertible into the capital stock of the company at par, at any time before maturity, upon thirty days' written notice to the company, and each bond to contain an express waiver of all recourse by the holder of the same to any individual liability of the stockholders of this company.

"That said bonds shall be dated as made on the first day of January, A. D. 1873.

"In case default be made in payment of any half year's interest on any of said bonds, and the warrant for said interest shall have been presented and its payment demanded, and such default shall have continued for six months after such demand, without the consent of the holder of said coupon or bond, then and thereupon the principal of all such bonds shall become immediately due and payable. That a warrant for each semi-annual payment of interest shall be made and authenticated, for and on behalf of this company, by the secretary of this company, and annexed to each bond. That said bonds shall be prepared by the president of the company, and signed by him for and on behalf of this company, and attested by the treasurer, and shall have annexed to them a certificate of authentication of the trustee or trustees, under the mortgage made to secure them, and shall not be issued or obligatory without such certificate.

"That for the purpose of securing the final payment of said issue of $1,000,000 of bonds, with all interest to accrue thereon, this company will make and deliver to James D. Fish and James W. Elwell, as trustees, a mortgage and deed of trust, conveying to said persons as trustees, for the benefit of every holder of such bonds, or any of them, all the road of this company, extending from Chicago, in Cook County, Illinois, southerly through the counties of Cook, Will, Kankakee, Iroquois, and Vermillion, to the city of Danville, in said State of Illinois, and also extending from a point on the line above described, situate about twelve miles north of Danville aforesaid, in a southeasterly direction to the boundary-line of the State of Indiana; and thence in said last-named State in a southeasterly direction to Covington, in Fountain County; thence southerly to Montezuma, in Parke County; and thence southeasterly to Brazil, in Clay County, on the line of the Terre Haute and Indianapolis Railroad. Also a branch road extending from the main line before described, commencing at a point on said main line distant about three miles south from Covington, in Fountain County, and extending in an easterly direction to the village of Newburg, in said county, and also all such additional branch roads as this company may hereafter construct, for the purpose of extending its tracks into the coal and

mining regions in the vicinity of its said main lines of road, with all the property, rights, and franchises of this company, of every kind and description whatever pertinent to said roads, between all said terminal points, and all the income to be had and derived from operating the same—in trust, to secure the final payment of said bonds as aforesaid—with all the rights, covenants, powers, and authority, in case default be made by this company in such payments as in said deed of trust
65 shall be specified, to foreclose said mortgage, and to sell the property so mortgaged, or to take possession of and operate the same, and receive the incomes thereof; but not, in any case, before any default, to disturb or interfere with this company in the possession, control, and management thereof, or from receiving the incomes thereof, or from selling or exchanging any of the personal property, or machinery, or equipments thereof, or any of the lands or real estate, not necessary for the use and operation of the railroad; as to all of which, as will be in said mortgage and deed of trust specifically stated, agreed upon, and set forth. That the president of this company is hereby authorized and fully empowered to make and sign, and execute, and seal with the corporate seal of this company, the said mortgage and deed of trust, and to acknowledge the same for and on behalf of this company for record; and on the acceptance of said trust, and signing the said deed by the said trustees, to cause the same to be recorded according to law, and thereupon to make, sign, execute, and prepare said $1,000,000 of bonds for issue and sale, as shall be hereafter ordered by this board."

And whereas the said Chicago, Danville and Vincennes Railroad Company, party of the first part, hath, in accordance with the provisions of said order and resolution, made and executed bonds to the amount of one million dollars, of the form, denomination, and character prescribed by said order and resolution, and hold the same to be authenticated, issued, used, and disposed of, for the purposes in said order and resolution stated:

Now, therefore, in further pursuance of said order and resolution, and to the end and purpose of securing and assuring the punctual payment of said one million dollars of bonds, and every part thereof, which may be issued, to the persons who may become the holders of the same, or any of them:

This indenture witnesseth, that the said Chicago, Danville and Vincennes Railroad Company, party of the first part, in consideration of all and singular the premises, and for the further consideration of one dollar to them in hand paid by the said party of the second part, trustees as aforesaid, at and before the ensealing hereof, the payment of which is hereby acknowledged, doth hereby grant, bargain, sell, enfeoff, release, assign, and convey unto the said James D. Fish and James W. Elwell, trustees as aforesaid, party of the second part, and to their successors and assigns, all and singular the entire railroad of the party of the first part, lying, being, and extending from its terminus in the city of Chicago, in Cook County, Illinois, southerly through the counties of Cook, Will, Kankakee, Iroquois, and Vermillion, to the city of Danville, in said State of Illinois, and also extending from a point on the line above described, situate about twelve miles north of Danville aforesaid, in a southeasterly direction to the boundary-line of the State of Indiana, and thence in said last named State in a southeasterly direction to Covington, in Fountain County; thence southerly to Montezuma, in Parke County, and thence southeasterly to Brazil, in Clay County, on the line of the Terre Haute and Indianapolis Railroad. Also, a branch road extending from the main line before described, commencing at a point

on said main line distant about three miles south from Covington, in Fountain County, and extending in an easterly direction to the
66 village of Newburg, in said county, the entire length of road being about two hundred and ten miles; and also all such additional branch roads as said party of the first part may hereafter construct, for the purpose of extending its tracks into the coal and mining regions in the vicinity of said main lines of road; with all its franchises, equipments, property, tolls, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods, and chattels, connected with or used in the using or operating of said railroad, or appurtenant thereto, and all its rails, ties, fuel, fencing, and erections, and all its rights of way and easements, and all cars, engines, and tools, and all rents, reservations, and reversions of every nature and kind whatever, including all the property between all said terminal points which said party of the first part now has or owns and possesses, or may hereafter acquire, either in law or equity, of every kind whatever pertinent thereto. Provided, however, that this grant and conveyance aforesaid shall not include nor operate to transfer any lands, goods, chattels, property, machinery, equipment, or other matters which said company now owns, or may hereafter acquire, that need not be used for any purpose incident to the management or operation of said railway, or the repair thereof, or in the business of said railway company; nor any franchises, power or corporate right to build that portion of the line of railroad which, by its charter, it is authorized to locate and construct, and not embraced within the terminal points hereinbefore described; but all which last-mentioned franchises and right of way shall be wholly excepted and exempt from these presents, and the grant and conveyance herein specified; nor shall these presents in any way prohibit the party of the first part from selling and conveying or otherwise disposing of the same, and all the proceeds thereof; nor from receiving, using, and applying any money or personal property of said company to the repairs of said road or its appurtenances, or to its current expenses, or to the purchase of necessary machinery, or the renewal thereof; and the board of directors of said company may likewise distribute and pay any net annual incomes and profits to stockholders, after paying the interest on the said bonds, and providing for any sinking fund required to be created and kept. To have and to hold the said railway property, premises, interests, rights, and appurtenances mentioned as aforesaid, and hereby conveyed, or intended so to be, by this conveyance, unto the said party of the second part, as such trustees as aforesaid, and to their successors in said trust, or assigns, to and for the only use, benefit, and behoof of the said trustees and their cestui que trust, their successors and assigns forever; but in special trust and confidence, and upon the conditions following, that is to say:

1st. That this conveyance is for, and shall be by the said party of the second part, their successors and assigns, held, used, and owned solely for the benefit and protection and security of the persons and corporations who shall hold and own the bonds about to be issued as aforesaid by the party of the first part, and for enforcing the stipulations of said company as to said issue of bonds, and the disposal thereof, and securing the same, and the final payment thereof, in their true in-
67 tent and meaning, whether contained in said bonds, or the interest warrants attached to them, or in this deed.

2d. That for the better assuring and confirming the title and powers of the said party of the second part, their successors and assigns, in the said premises and property hereby conveyed, and in and to any premi-

ses and property or rights hereafter accruing or to be acquired by said party of the first part, appurtenant to said railroad, which is intended to pass or be passed by this conveyance, the said party of the first part, their successors and assigns, will and shall, as often as may be lawfully required by the party of the second part, or their successors or assigns, holding the above-granted trust, do such acts, and make such other and further conveyances and assurances in law as such party of the second part shall, by counsel learned in the law, be advised are necessary for the better carrying out of the object of the parties to this mortgage or deed of trust.

3d. That if the said party of the first part, their successors or assigns, shall well and truly pay to the holders of said one million dollars of bonds, so to be issued and hereby secured, the respective sums of money and interest due and accruing on said bonds on the days and times therein mentioned, and according to the tenor and effect of said bonds, then and thenceforth this indenture, and all the estate hereby granted, shall become and be utterly void and of no further effect; and the same shall be, by such payment, wholly annulled and satisfied, without any further receipt or entry of satisfaction of record whatever, but shall be, if required, entered and certified on any record of the same as so satisfied by the party of the second part, or their successors.

4th. That until default shall have been made by the party of the first part in the payment of principal or interest of the said bonds, or some of them, or until default shall have been made in respect to something herein required to be done by the said party of the first part, the said party of the first part shall be suffered and permitted to possess, use, occupy, manage, and operate the said railroad property, and franchises, and appurtenances, and to renew, replace, and repair the same, and every part thereof, and take and receive and use the tolls, rents, issues, incomes, and profits thereof, and dispose of the same in any manner not inconsistent with this instrument.

5th. In case default shall be made in the payment of any interest on any of the aforesaid bonds issued or to be issued, according to the tenor of the coupons thereto annexed, or of the provisions hereof; or, in case default shall be made in the payment of the principal of said bonds, or any of them, when the same shall become due, without the consent of the holder of such bond on which said default shall occur, the said party of the first part hereby covenants and agrees to and with the party of the second part, and their successors and assigns, that within six months after such default shall have occurred, the same default still continuing, the said party of the first part, on demand of the said trustee or trustees for the time being, shall and will surrender to him or them, or to their agent, the actual possession of the herein granted and demised railroad and premises, together with all the books, records,
68 papers, accounts, and money of said company, and all management and control thereof; and that all the expenses of taking, holding, managing, and operating said property, if possession be so taken, shall be paid from the income and profits thereof; and if said property shall, after such taking possession thereof, be sold, then from the sale thereof; or such expenses may be paid from the sale of any personal property, as the said trustees may deem proper; and that said party of the second part, and their successors, having taken such possession, may manage, operate, and control said road and property, and all of its affairs, and appoint all needful agents and employés for that purpose, and pay the same, and receive all the incomes, issues, and profits thereof, and apply the same to the payment of the said interest so in

default, according to the true intent and tenor of the said bonds and the coupons annexed and to the terms of this deed, until such default shall have been satisfied, if such incomes and profits will satisfy the same—first paying all expenses of such possession and management, and all taxes, assessments and charges on said property, and a just compensation for their own services as such trustees. But in any and all cases of such taking of possession by said party of the second part, and paying up any such default, and the expenses aforesaid, the said party of the second part shall immediately thereafter redeliver the said railway and premises, books, records, and money and accounts into the possession of the party of the first part; provided that no such demand for such possession shall be made by said trustee or trustees until they shall have been required by the holders of at least the one-half of all the said issue of bonds which shall then be unpaid and outstanding to make such demand and to take such possession of said road and property.

6th. That in case default shall be made as aforesaid, and shall continue as aforesaid, it shall be lawful for the party of the second part, or their successors in said trust, after entry as aforesaid, or other entry, or without entry, personally, or by agent or attorney, to sell and dispose of, to the highest bidder, all and singular the premises hereby conveyed, or intended so to be, at public auction, in the city of Chicago, in the State of Illinois, or in the city of Indianapolis, in the State of Indiana, at such time as said party of the second part may appoint, first having demanded of the party of the first part full payment of all money then in default; and also first having given sixty days' notice of such time and place of sale, and a full description of the property so to be sold, by advertisement thereof in three newspapers; one published in Chicago, in the State of Illinois, one published in Indianapolis, in the State of Indiana, and one published in the city of New York; and to adjourn said sale from time to time, in their discretion, and, if adjourned, to make such sale in manner aforesaid, without further notice, at the time and place to which it may be adjourned; and upon such sale, and receiving the purchase-money therefor, to convey the same, by good and sufficient conveyances, to the purchaser or purchasers; and such sale and conveyance so made shall convey all the right, title, estate, interest, and property of the said party of the first part of, in, and to the said road, premises, franchises, and property to the said purchaser, in fee-simple, forever; and shall be a perpetual bar, both in law and equity, against
69 the said party of the first part, and their successors and assigns, and against all and every person claiming or to claim the said premises, or any part thereof, under them, forever. After deducting from the proceeds of such sale the expenses of the sale and conveyance, and all advances or liabilities which may have been made or incurred by the party of the second part in operating and controlling and maintaining the said railroad and property, and in managing its business and affairs while in possession, and all payments for taxes, charges, and assessments on said premises, or any part thereof, as well as reasonable compensation for their own services, to apply the proceeds of such sale to the payment of the interest on said bonds, or so many of them as shall have been issued by said party of the first part and be then outstanding, pro rata, until such interest shall be paid, and afterwards to apply the remainder to the payment of the principal of said bonds, pro rata, until such principal shall be paid; and if any surplus remain after paying all of said matters, to pay such surplus to the party of the

first part; and such payments shall be so made on said bonds whether the same shall have become due or not at the time of such sale.

It is hereby declared that the receipt of said trustee or trustees, making any such sale to the purchaser of the premises for the purchase-money, shall be a full and sufficient discharge of such purchaser therefor, and that said purchaser shall not, after payment of said purchase-money, and obtaining such receipt therefor, be liable, or in any way bound to see said purchase-money applied to this trust, or otherwise, or in any manner answerable for its loss or misapplication, or obliged to inquire into the authority for making such sale.

7th. At any sale of the property aforesaid, or any part thereof, made by virtue of these presents, or by judicial authority, the said trustee or trustees may bid for and purchase, or cause to be purchased, the property so sold, or any part of it, in behalf of the holders of said bonds secured by this deed then outstanding, at a reasonable price, if only a part be sold; but if the whole property be sold, at a price not exceeding the whole amount of said bonds and interest then outstanding.

8th. If default be made by the party of the first part in the payment of any half year's interest on any of said bonds, and the warrant or coupon for such interest shall have been presented and its payment demanded, and such default shall have continued six months after such demand, without the consent of the holder of such coupon or bond, then and thereupon the principal of all the said bonds hereby secured shall be and become immediately due and payable, anything in such bonds to the contrary notwithstanding; and the said party of the second part may so declare the same, and notify the party of the first part thereof, and, upon the written request of the holders of a majority of the said bonds then outstanding, shall proceed to collect both principal and interst of all such bonds outstanding, by foreclose and sale of said property or otherwise, as herein provided.

9th. It is hereby mutually agreed by the parties hereto, that the trustees shall be responsible only for gross negligence and willful default, and that they shall not be bound to do any act touching the execution of the trust, except at their own option, which may involve them in personal expense or liability, unless first duly and satisfactorily indemnified against the same by one or more of said bondholders.

In case of the death, resignation, or inability, to act of any trustee, the board of directors may appoint a successor, and failing to so appoint, any court of competent jurisdiction may appoint a trustee to fill such vacancy, on the application of the holders of the one-sixth part of the bonds hereby intended to be secured, then outstanding, and such appointment by the board or by such court shall invest the trustees so appointed with all the interest, estate, power, and authority in the premises, and subject him or them to the same obligations hereby given and granted to the party of the second part herein.

In witness whereof the said Chicago, Danville and Vincennes Railroad Company, the party of the first part, has caused these presents to be executed and signed by the president of their company, and attested by their secretary, in their behalf and for the said company, and has caused the corporate seal of the company to be hereto affixed, the day and year

first above written. And the parties of the second part have hereunto set their hands and affixed their seals, the same day and year aforesaid.

[SEAL.] CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY,
By W. D. JUDSON, *President.*

Executed in presence of—
H. A. GILDERSLEEVE.
R. N. WHITLOCK.
JAMES D. FISH, [SEAL.]
JAMES W. ELWELL, [SEAL.]
Trustees.
J. S. CAMPBELL,
Secretary.

STATE OF NEW YORK,
City and County of New York, ss:

Before me, the undersigned, a notary public of the State of New York, in the city of New York, duly commissioned and qualified, came this day William D. Judson, to me personally known, and also known by me to be the president of the Chicago, Danville and Vincennes Railroad Company, the party of the first part in the above deed of trust, and who executed the same on behalf of said company, and acknowledged that the said railroad company, and he, as the president of said company, and its behalf, did sign, seal, and deliver the said indenture and deed of trust as and for its own act and deed, and for the uses and purposes therein mentioned.

Also personally appeared before me, at the same time, the above-named James D. Fish and James W. Elwell, trustees, and the
71 party of the second part in the foregoing mortgage and deed of trust, and both personally known to me as the persons who signed the same as such, and each acknowledged that he did sign, seal, and execute the same for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this nineteenth day of December, anno Domini, 1872.

[SEAL.] H. A. GILDERSLEEVE,
Notary Public, New York City and County.

EXHIBIT K.

Chattel mortgage.

This indenture, made the twelfth day of January, A. D. one thousand eight hundred and seventy-five, between the Chicago, Danville and Vincennes Railroad Company, a corporation existing under the laws of the States of Illinois and Indiana, party of the first part, and R. Biddle Roberts, of the city of Chicago and State of Illinois, trustee, upon certain trusts hereinafter specified and provided, the party of the second part, witnesseth as follows:

That the party of the first part, in order to pay off and discharge certain debts and obligations incurred in the construction, equipment, and operating of said railroad, and to enable them to conduct, operate, and continue the business of said company, and also in pursuance of the resolutions of said company passed the second day of January, A. D. 1875, a copy of which resolutions is hereto annexed, marked "A," and forming part of this indenture, have made and issued their several bonds or obligations, all having even date herewith, and which are numbered and are of the several denominations following, to wit: Nine hundred and

fifteen bonds of one thousand dollars each, numbered from number 1 to 915, both inclusive; one hundred bonds of five hundred dollars each, numbered from number 916 to 1015, both inclusive; one hundred bonds of two hundred and fifty dollars each, numbered from 1016 to 1115, both inclusive; and one hundred bonds of one hundred dollars each, numbered from 1116 to 1215, both inclusive; and each of said bonds being made payable to said party of the second part, or bearer, at the said company's office, in the city of Chicago, on the twelfth day of January, A. D. 1877, with interest thereon at the rate of seven per cent. per annum from the date thereof.

Now, this indenture witnesseth that the party of the first part, in order to secure the payment of the said several bonds hereinbefore mentioned as they respectively fall due, in the hands of bona-fide holders thereof, and the interest thereon, and in consideration of the sum of one dollar to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, have granted, bar-
72 gained, sold, assigned, released, conveyed, and confirmed, and by these presents do grant, bargain, and sell, assign, release, convey, and confirm, transfer and set over, unto the said party of the second part, trustee as aforesaid, and his successors or assigns, all the locomotives, passenger-cars, baggage-cars, freight-cars, shop-tools, and all other machinery and personal property, now owned by or in the possession of the said party of the first part, and more particularly named and described in the schedule hereto annexed marked "B," and which said schedule forms a part of this indenture, subject, however, to such prior liens as there may be upon the same, or upon any portion thereof, if any such prior liens exist.

To have and to hold the same to the said party of the second part, or to his successors or assigns, forever. And it is hereby further mutually declared, granted, and agreed by the said company, party of the first part, and said party of the second part, trustee, representing the rights and interests in the securities of the parties taking or holding the said bonds and obligations, in the form and manner following, viz: That if the said party of the first part shall well and faithfully pay the said principal sum of said bonds, on the day when the same are made payable by this indenture, as above mentioned, according to the true intent and meaning thereof, with the interest due thereon, or shall deliver up, cancelled, to the said party of the second part, all of the said bonds mentioned herein, then these presents shall cease and determine; that until default shall have been made by the party of the first part, in the payment of the principal or interest of the said bonds, or some of them, or until default shall have been made in respect to something herein required to be done by the said party of the first part, shall be suffered and permitted to possess, use, occupy, manage, and operate all of the chattels and property mentioned herein, and to renew and repair the same and every part thereof, and take and receive, and use, the tolls, rents, issues, incomes, and profits thereof, and dispose of the same in any manner not inconsistent with this instrument.

But if default shall be made by the party of the first part in the payment of said bonds or obligations, at the time they shall fall due, according to the true intent and meaning thereof, then it shall be lawful for the said party of the second part, or his successors or assigns, and it shall be his or their duty, and they are hereby authorized and empowered, either in person or by attorney, or by his agents, to take possession of the said chattels, and all other articles mentioned in the said annexed schedule, and to sell or dispose of the same, or any part thereof, at pub-

lic auction, at the best price he can obtain for the same, according to the statute in such cases made and provided, and out of the proceeds arising from such sale to defray the expenses of such sale, and his own just and lawful charges, and then pay over the proceeds to and amongst the parties holding the said bonds or obligations, so far as may be necessary to pay the amount then due and in arrears upon the same, and the balance of the proceeds (if any there be) to be paid over to the said parties of the first part, or their assigns.

In witness whereof the said Chicago, Danville and Vincennes
73 Railroad Company, the party of the first part, has caused these presents to be executed and signed by the president of their company, in their behalf and for the said company, and has caused the corporate seal of the company to be hereto affixed, the day and year first above written, and the party of the second part has hereunto set his hand and affixed his seal, the same day and year aforesaid.

(Signed) [SEAL OF CO.] CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY,
By W. D. JUDSON, *President.*

(Signed) [SEAL.] R. BIDDLE ROBERTS, *Trustee.*

STATE OF ILLINOIS,
County of Cook, ss:

This chattel mortgage was acknowledged before me by W. D. Judson, president of the Chicago, Danville and Vincennes Railroad Company, and R. Biddle Roberts, the said trustee, and entered by me this thirteenth day of January, A. D. 1875.

(Signed) J. CHARLES HAINES,
Justice of the Peace.

EXHIBIT A.

Resolved, That an issue of bonds shall be made by the company, amounting in the aggregate to a sum not exceeding one million of dollars, in such denominations as the officers of the company may deem advisable, payable in not exceeding two years from date of issue, either with or without interest, and that the said bonds be secured by a chattel mortgage to a trustee or trustees, upon all the locomotives, passenger-cars, baggage and freight cars, and all other machinery and shop-tools and other personal property now owned by or in possession of the company, subject to such prior liens as there may be upon the same in favor of the bondholders of the company, or any other parties, if any such prior liens exist, and that the president of company be, and he hereby is, authorized, directed, and fully empowered to make and sign, and execute and seal, with the corporate seal of the company, the said chattel mortgage or deed of trust, and to acknowledge the same for and on behalf of this company for record, and on the acceptance of said trust by the said trustee or trustees, to cause the same to be recorded according to law, and thereupon to make, sign, execute, and prepare the said bonds for issue, and to use and dispose of the said bonds to settle and pay, or to secure, any portion of the indebtedness of this company.

74 EXHIBIT B.

Thirty-four (34) locomotive-engines, numbered from No. 1 to 34, both inclusive.

Three hundred and seventy-six (376) gondola coal-cars, numbered from No. 1 to 376, both inclusive.

One hundred and fifteen (115) stock-cars, numbered from No. 501 to 615, both inclusive.

One hundred and fifteen (115) box-cars, numbered from No. 1,001 to 1,115, both inclusive.

Two hundred and twenty-five (225) gondola coal-cars, numbered from No. 0141 to 0365, both inclusive.

Six (6) caboose-cars, numered from No. 1 to 6, both inclusive.

Four (4) baggage-cars, numbered from No. 1 to 4, both inclusive.

Three (3) mail and passenger-cars, numbered from No. 1 to 3, both inclusive.

Eight (8) passenger-coaches, numbered from No. 1 to 8, both inclusive.

The following machinery and tools in the machine-shops at Danville, Vermillion County, Illinois:

1 44-inch iron planer.
1 30-inch iron planer.
2 14-inch shaping-machines.
1 slotting-machine.
1 lathe, 34-inch swing.
1 lathe, 16-inch swing.
1 lathe, 20-inch swing.
1 lathe, 25-inch swing.
1 axle-centreing lathe.
1 hydraulic wheel press.
1 driving wheel lathe.
1 car-wheel borer.
1 boiler-maker's shears.
1 boiler-maker's punch.
1 hydraulic crank-pin press.
1 steam hammer.
1 bolt cutter.
1 small emery grinder.
1 axle lathe.
1 drilling press.
1 drilling press.
1 stationary steam-engine.

(Endorsed:) Filed September 14, A. D. 1875. W'm H. Bradley, clerk.

75 Afterwards, to wit, on the 23d day of October, A. D. 1875, said defendant, The Chicago, Danville and Vincennes Railroad Company, by its solicitor, filed in said clerk's office its answer to said amended bill of complaint in said entitled cause, which said answer is in the words and figures following, to wit:

Answer to amended bill of complaint.

In the circuit court of the United States, northern district of Illinois.

WILLIAM R. FOSDICK AND JAMES D. FISH, complainants, *vs.* CHICAGO, DANVILLE AND VINCENNES RAILroad Company, James W. Elwell, and R. Biddle Roberts, defendants.	In chancery. Amended bill.

The separate answer of the Chicago, Danville and Vincennes Railroad Company, one of the defendants, to the amended bill of complaint of William R. Fosdick and James D. Fish, complainants.

This defendant, now and at all times hereafter reserving to itself all and all manner of benefit or advantage of exception or otherwise
76 that can or may be had or taken to the many errors and uncertainties and imperfections in the said amended bill of complaint contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer thereto, answering saith:

Respondent admits that it is a corporation organized and existing

under and by virtue of the laws of the State of Illinois, and was so organized under an act of the general assembly of said State, entitled "An act to incorporate the Chicago, Danville and Vincennes Railroad Company," approved February 16th, A. D. 1865, and has been engaged since that time in business, by virtue of said act, at and within the northern district of Illinois; that by its charter it was authorized and empowered to locate, construct, build, maintain, and operate a railroad from a point in Lawrence County, on the Wabash River, opposite Vincennes, in the State of Indiana, upon its most eligible route to Chicago, as alleged in said amended bill of complaint; also to unite and consolidate its railroad, stock, and property with any other railroad company or companies in this or any other State, whose line or lines of road should cross or intersect respondent's road, or that should be built
77 along or upon the line thereof, upon such terms as should be mutually agreed upon, and was empowered to execute contracts to perfect such consolidation.

Admits that in and by said charter it was authorized to borrow money on its credit, not exceeding its authorized capital stock, at a rate of interest not exceeding ten per centum per annum, payable semi-annually, and to execute bonds therefor with interest coupons annexed, securing the payment of the same by a mortgage or deed of trust upon the whole or any part of its road and income then existing, or to be afterwards acquired.

Admits that its directors were authorized to negotiate and sell said bonds in the manner alleged in said amended bill of complaint.

Admits that prior to March 10th, A. D. 1869, its capital stock was $2,500,000, and that thereafter, and on said 10th day of March, A. D. 1869, it caused 2,500 bonds to be issued, duly executed, numbered from 1 to 2,500 inclusive, each in the sum of $1,000, payable in gold coin on April 1st, A. D. 1909, with interest at seven p'r c't in gold, pay-
78 able semi annually, on the first days of April and October in each year, on delivery of said coupons in the city of New York, at a place designated by said respondent, and also admits that Exhibit A of the original bill herein is a copy of one of said bonds, with coupon attached.

This respondent further admits that, for the purpose of securing said 2,500 bonds, and the interest coupons thereto attached, it executed and delivered to complainants, as trustees, a mortgage or deed of trust, conveying to them, for the benefit of holders of such bonds, all of its said railroad, extending from the city of Chicago, in Cook County, Illinois, through the counties of Cook, Will, Kankakee, Iroquois, and Vermillion, to the city of Danville, and thence southeasterly to a point on the State line of *Iroquois*, and all its franchises, equipments, property, tolls, rents, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods, and chattels, connected with or used in the using or operating of its said railroad, or appertaining thereto, and all its rails, ties, fuel, fences, right of way, and easements, and all cars, engines, tools, all rents, reservations, and reversions of every nature, includ-
79 ing all property which said respondent then owned or might thereafter acquire between said terminal points.

Also admits that Exhibit B, attached to the original bill, is a copy of said mortgage; also that said mortgage, on said 10th day of March, A. D. 1869, was duly executed and delivered to said trustees, and the trust by them accepted. Also that said mortgage, during said month of March, A. D. 1869, was duly recorded in all the counties heretofore named, and

became a first lien upon the property of this respondent, according to the conditions thereof.

Your respondent further admits that all of said bonds were certified by said trustees, and that they were thereafter sold by respondent; that they are now outstanding, and a valid lien against this respondent.

Respondent further admits that it consolidated, March 4th, A. D. 1872, with the Rossville and Indiana Railroad Company, such consolidation taking the name of the respondent, and that Exhibit D of the original bill is a copy of such articles of consolidation.

Respondent further admits that, on March 9th, A. D. 1872, it consolidated with the Western Indiana Railroad Company, such consoli-
80 dation taking the name of this respondent, and that Exhibit D of the original bill is a copy of such articles of consolidation.

Further admits that said Western Indiana Railroad Company was, prior to said last-named consolidation, a corporation of the State of Indiana, and that this respondent, by virtue of said consolidation, became and was a corporation of the said State of Indiana, as well as a corporation of the State of Illinois; and, further, that this respondent became and was vested with lawful power under the laws of said State of Indiana to locate, construct, and operate a continuous line of railway, extending from the boundary-line between the States of Indiana and Illinois, at a point and through the counties named in said complainants' amended bill of complaint.

Your respondent further admits that, on the 12th day of March, A. D. 1872, for the purpose of providing means for the construction and equipment of said line of road in Indiana, it caused bonds to be executed to the amount of $1,500,000, being 1,500 bonds, in $1,000 each, payable 40 years after date, with interest payable, and numbered, respect-
81 ively, as alleged in said amended bill of complaint.

Respondent further admits that, to secure said last named bonds, and coupons thereto annexed, it executed and delivered to complainants, on said March 12th, A. D. 1872, its certain mortgage or trust-deed, conveying to said trustees respondents' entire length of road in Indiana, described in complainants' said amended bill of complaint, and also all such additional branch roads as respondent might thereafter construct in extending its track into the coal and mining regions in the vicinity of said main line of road, with all its franchises, equipments, property, tolls, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods, and chattels, connected with or used in operating said line of road, and all its rails, ties, fuel, fencing, and erections, right of way, easements, cars, engines, tools, and all rents, reservations, and reversions of every kind; that Exhibit F is substantially a copy of said mortgage.

Further admits that afterwards, to wit, on said 12th day of March, A. D. 1872, said mortgage was delivered to complainants as trustees; and said respondent believes that said complainants accepted the
82 trust thereby created *created* and entered upon the performance of their duties, and duly certified all of the said bonds so issued.

Respondent further admits that said bonds were disposed of in the manner alleged in said amended bill of complaint, and are now outstanding and valid obligations of this respondent. Further, that said mortgage was, during said month of March, A. D. 1872, duly recorded in Warren, Fountain, Park, and Clay Counties, in the State of Indiana, and became a first lien upon all the property and franchises of respondent within said counties.

Your respondent, further answering, admits that it did, by its proper

officers, on the 24th day of April, A. D. 1872, execute a further or so-called consolidated mortgage, for the purposes stated in said mortgage, a copy of which is filed with said amended bill of complaint as Exhibit G; and respondent avers that by the terms of said mortgage it is provided, and the right to said corporation given, to execute a still further mortgage for the purpose of providing means, whenever necessary, for the purchase of additional rolling-stock and equipment for the use
83 of its said railroad, which should have a priority of lien to the said mortgage of April 24th, 1872. That the necessity of such additional equipment became apparent to the officers of said corporation in the summer of 1872, and it was then determined to issue the so-called convertible mortgage which was afterwards executed by said company.

For this reason said mortgage of the 24th of April, 1872, was never recorded in any of the counties upon the line of either division of said company's road, and did not become, and is not, a lien upon any of the property of this respondent.

Respondent further admits that on May 6th, A. D. 1872, it consolidated with the Attica and Terre Haute Railroad Company, and that these two corporations became a consolidated corporation by the name and style of this respondent. Exhibit E of original bill herein is substantially a copy of such articles of consolidation.

Admits, further, that it proceeded with the construction of its line of railroad in the States of Indiana and Illinois, and has constructed and put in operation a large portion thereof, and that said line of road
84 in Illinois commences at Dalton, 20 miles south of Chicago, and runs southerly to Danville, in Vermillion County, a distance of about 108 miles, with a branch from Bismarck, in said Vermillion County, to the east line of said State, a distance of about 7 miles, making a total of about 115 miles.

Admits that it runs its cars over the line of the Chicago and Southern Railroad from a point near Dalton into Chicago; also, that it uses a portion of the line of the Pittsburgh, Cincinnati and St. Louis Railway Company near and within Chicago, and that it has side tracks of its own in said city.

Respondent further admits that in Indiana it has constructed and completed main line of about 18 miles and about 5 miles of branch road; from Snoddy's Mills to Montezuma, a distance of about 18 miles, the right of way has been procured, and about twenty per cent. of the grading finished; from Montezuma to Brazil Coal-fields, about 25 miles, the right of way has been procured, and 85 per cent. of the grading done, all the bridging and about 2 miles of track laid. That respondent's road in Indiana is known as the Indiana Division, and its road in
85 Illinois as the Illinois Division.

Admits that it paid all coupons maturing upon said bonds, and each of them up to and including the one maturing April 1, 1873.

Respondent, further answering, says that true it is that subsequent to October 1st, A. D. 1873, the holders of said 4,000 bonds to the amount of $2,801,000 thereof placed in the hands of William R. Fosdick, one of the complainants herein, the coupons on said bonds maturing October 1st, 1873, April 1st and October 1st, 1874, and April 1st, 1875, and that each of said holders received from respondent a certificate of indebtedness for the amounts of said coupons so placed in the hands of said Fosdick, and which said certificates were each payable on April 1st, 1879, with interest from and after February 1st, 1874, at seven per cent. per annum, payable semi-annually, on the first days of February and August, respectively, in each year, at the office or agency of said re-

spondent in the city of New York, upon the delivery of the interest-warrants annexed to said certificates, both principal and interest payable in gold.

That true it is that in said certificates respondent agreed, among other things, that in case of non-payment thereon on demand
86 when due, or in case of the non-payment of coupons maturing October 1st, 1875, and thereafter until payment of said certificates on maturity, the holder thereof should be entitled to demand and receive from said Fosdick the interest-coupons described in said certificates, and with all his rights to proceed against this respondent. Exhibit H is a copy of one of said certificates.

And said respondent, further answering, says that the interest-warrants upon said funding certificates maturing August 1, 1874, were paid by said company when presented for payment, and that all of said coupons have been paid.

That as to such interest warrants maturing February 1st, 1875, there remains unpaid only the sum of $3,167 $\frac{77}{100}$, all the others of said coupons having been paid by said respondent.

And the respondent says that said balance of said interest-warrants then remaining unpaid, to wit, the sum of $3,167 $\frac{77}{100}$, would have been paid and canceled by this respondent had they been presented for payment at maturity, and that this respondent is not and should not be held responsible for such apparent default.

87 Said respondent says that on the 22d day of February, A. D. 1875, one Stephen Osgood, without any notice whatever to this respondent, upon his ex parte application to the judge of the circuit court of Will County, in the said State of Illinois, wrongfully and fraudulently procured the appointment of receivers of all the property, assets, and income of the said respondent within the State of Illinois, and that such receiver forcibly took possession of the offices and all the property of said respondent on said 22d day of February, and by the aid of writs of assistance, and other process issued by said court, or the judge thereof, held the possession of all said property of this respondent, its earnings and income, until the first day of June, 1875, at which time said receivers were removed by the order of this honorable court, and a receiver of all such property appointed under the prayer of the complainants in the said original bill of complaint contained.

And this respondent says that on said 22d day of February it was not in default in the payment of any of said certificate-warrants that matured February 1st, 1875; that all of said warrants were paid as presented to this respondent prior to said 22d day of February; and that
88 such balance of $3,167 $\frac{77}{100}$ was not paid, for the reason that the action of said State court had deprived this respondent of the power to meet such payments. But the said respondent denies that said corporation was on said first day of February, 1875, insolvent and unable to meet the payment of said certificate-warrants, as charged in said amended bill of complaint, but, on the contrary, avers and charges that at all times after the maturity of said interest, and until said 22d day of February, said respondent had the pecuniary ability and was ready and willing to pay all such interest, and did in fact pay all such interest-warrants when presented.

And the said respondent further says and charges the fact to be that the net earnings of said company, during the year 1874, and the months of January, February, April, and May of the present year, were more than sufficient to pay all the interest accruing upon the bonds issued under the trust-deed to the complainants; and also the interest upon said

certificates of indebtedness, and upon all other mortgage-bonds that had been negotiated and sold by said respondent.

And the said respondent says that the said company is not in default in the payment of any certificate interest-coupons after proper
89 demand, and that therefore none of the holders of said certificates are lawfully entitled to the return from the said Fosdick, special trustee as aforesaid, of the bond interest-warrants so funded and deposited with the said Fosdick.

Your respondent admits that the contracts for funding said interest-warrants are substantially set forth in said complainants' amended bill, and that the holders of about four-fifths of the said 4,000 first-mortgage bonds then, and about three-fourths of all now, outstanding entered into said agreement, and so funded their said interest-warrants.

Your respondent, further answering, admits the issue of a so-called convertible bond by said corporation, bearing date the first day of January, A. D. 1873, to the amount of one million dollars, which said bonds were secured by a deed of trust, dated the 16th day of December, A. D. 1872, by which the said company conveyed to the said James D. Fish and James W. Elwell, as trustees, all its property, rights, and franchises in the States of Indiana and Illinois, subject, however, to the prior liens created by the trust-deeds of March 10th, A. D. 1869, and of March 12th, A. D. 1872, all of which said bonds, amounting in the aggregate
90 to one million dollars, have either been sold or hypothecated by said company.

Your respondent also admits the resignation of the said James D. Fish of his said trust, and that the said Elwell is now sole trustee under said deed of trust.

Your respondent, further answering, denies that said mortgage of December 16th, A. D. 1872, creates a third lien upon the property of said corporation. It admits that the trust-deed of March 12th, A. D. 1872, is a first and prior lien upon all the property of said respondent situated within the State of Indiana, and that the lien created by the trust-deed of March 10th, A. D. 1869, is a first and prior lien upon all the property described therein, that is to say, all the property, rights, and franchises of said company embraced within the terminal points of the road it was authorized by its charter to construct and necessary to the management and operation of said road, but said respondent avers that all other property, rights, and franchises of every kind and character belonging to said company, or thereafter to be acquired, is, by the terms of said trust-deed, expressly reserved from the lien
91 thereby created; and respondent says that prior to the first day of January, 1873, it did, under authority conferred by its charter, construct a branch road from Bismark, a station on its main line, in the said county of Vermillion, in a southeasterly direction to the west line of the State of Indiana, a distance of about seven miles, upon which said branch road said mortgage of December 16th, A. D. 1872, is a first and only lien.

And your respondent, further answering, says that it is not true, as stated in said amended bill of complaint, that at the time of the filing of the original bill herein a large number of judgments had been obtained against this respondent, nor had a large amount of its property been levied upon to satisfy said judgments, but, on the contrary, respondent says that on the said 27th day of February, A. D. 1875, to the best of respondent's knowledge and belief, there was not in the hands of any officer of any court any execution against this respondent, and there were only two or three judgments unappealed from against

the respondent, and your respondent avers, as to those, satisfa tory arrangements had been made for their gradual payment.

Respondent admits that on said 22d day of February a part of
92 its property in the State of Indiana was held by a writ of attachment, but the said respondent avers, and charges the fact to be, that said writ was issued on the 10th day of said month of February, in a suit then commenced in Warren County, Indiana, on pretended claims and demands against your respondent, but upon which it was in no manner liable; and respondent says, to the best of its knowledge and belief, said suit in Indiana was instituted for the purpose of aiding the said Osgood in his fraudulent action of placing the property of respondent in the hands of receivers, nominated by and in the interest of himself and of those combining and confederating with him. That after such appointment had been made, said attachment suit and proceedings were dismissed without any trial or hearing whatever.

And the said respondent, further answering, says that it admits that it has a large outstanding and unsecured indebtedness, principally created in the purchase of rolling-stock and equipment for the use of said company; but respondent submits to this honorable court that the fact of such indebtedness does not authorize the foreclosure
93 of said trust-mortgage nor justify the appointment of a receiver of the property of this respondent, nor has there been any default in the payment of interest as will authorize the seizure of said property and income, as claimed by said amended bill of complaint.

Your respondent, further answering, admits that said company, by its proper officer, did, on the 12th day of January, A. D. 1875, make, execute, and deliver to the defendant, R. Biddle Roberts, a chattel-mortgage, whereby said company conveyed to the said Roberts, as trustee, the personal property therein named to secure the payment of certain bonds to be issued by said company, amounting in the aggregate to the sum of one million dollars; that said mortgage was executed by authority of the board of directors of said company, and in pursuance of a resolution of said board adopted on the day of December, A. D. 1874.

And your respondent avers that said mortgage was not intended to, and did not in fact, affect the securities or equities of the complainants, or of any other bond-creditors of said company, but that said bonds were designed to be used only to "settle, pay, or secure any portion of the then existing indebtedness of said company," as expressed in
94 said resolution, and that said bonds have been used for such purposes and no other.

Your respondent, further answering, says that it has no knowledge, information, or belief of the number of said bondholders under said deeds of trust that have made demand upon said complainants that they should execute their said trust; but respondent says that said company is not, and was not at the commencement of this action, in default to one-half of such interest, and therefore respondent says that said bondholders had no right to make such demand, and neither were the complainants nor respondent required to accede to such demands by the terms of said trust-deed.

And the said respondent, further answering, says that it has no means of knowledge of the per cent. of the holders of said interest-warrants that matured October 1st, 1873, that presented such warrants to the company and demanded payment thereof; but respondent says if it is true, as charged, that at least ninety per cent. made such demands, at least eighty per cent. of the entire

number afterwards waived such payment, and consented to an
95 extension thereof, as hereinbefore stated, and that as to such eighty per cent. said company is in no default whatever.

And as to the holders of said six hundred and ninety-eight of said bonds, who did not fund their interest, the said respondent says, upon information and belief, and so charges, that a large majority thereof have consented to such default in the payment of said interest, and have assented to such extension; that many of the holders of such bonds have expressed to the officers of said company their assent to such extension, and promised and agreed (but not in writing) that they would in no manner interfere with, or, by their adverse action, defeat the plans of said company for the extension of payment of said interest.

And respondent further says that it has no knowledge that any holder of said bonds ever elected to declare the principal due on account of the default of said company, with the exception of the said Osgood, who only claimed to hold nine of said bonds. And as to the said Osgood the respondent says that, to the best of its knowledge and belief, the said Osgood never has, nor has any one at his request ever demanded
96 of said company, or of any of its officers or agents, payment of any of the coupons attached to any of the nine bonds of which he claims to be the owner, and that the only notice the respondent has ever had that the said Osgood had so elected, or that he demanded payment of either principal or interest, was derived from his said bill of complaint, filed in said circuit court of Will County, as aforesaid, on said 22d day of February.

And the said respondent further avers that on the 23d day of February, 1875, the said defendant offered and tendered the attorney of record of said Osgood, in open court in said county of Will, full payment, principal and interest, of all the bonds held by the said Osgood, which was refused by said attorney, and that respondent at the same time offered to deposit in court the full amount of said principal and interest, upon condition that said receivers should be discharged and said property restored to said respondent, which offer was refused by the said court.

And the respondent further charges that until the different holders of said bonds had been advised of the action of said court, and said respondent had been unlawfully dispossessed of its property, no
97 one of said bondholders had demanded of the complainants that they should demand the possession of said property of this respondent, or that they should in any manner interfere with its control, and the respondent states upon information that the only demand then made upon said complainants was that they should, as such trustees, protect and preserve such property from such unlawful conversion.

And respondent says that it has never received from the complainants, as trustees, notice that they had declared the principal of said bonds due and payable, and says that no demand of payment of such principal has ever been made upon this respondent.

And said respondent, further answering, denies that said complainants have ever been requested in writing or otherwise by the holders of a majority of said bonds to proceed to collect either principal or interest of said bonds, by foreclosure of said trust mortgage or sale of said property or in any other manner.

And the said respondent says that as to the holders of said eight hundred and one bonds, the coupons of which have been funded
98 as aforesaid, they and each of them are estopped from making any present demand upon said trustees, to foreclose said trust mortgage

and from prosecuting any present suit for such foreclosure either in their own names as complainants or in the names of such trustees.

And the said respondent, further answering, neither admits nor denies that said Indiana division of respondent's road is insufficient to secure the payment of the said Indiana division bonds, and humbly submits to this honorable court that such allegation is wholly immaterial to the issues herein presented.

And your respondent admits that the value of its said Illinois division of road greatly exceeds the amount of bonds issued under and secured by said mortgage of March 10th, A. D. 1869, and charges the fact to be that the net income derived from said Illinois division is greatly in excess of the current interest upon all of said bonds.

And your respondent denies that there is any other matter, cause, or thing in the said complainants' said amended bill of complaint contained, material or necessary for this defendant to make answer to,
99 which is not herein and hereby well and sufficiently answered, confessed, traversed, and avoided, or denied; all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

CHICAGO, DANVILLE AND VINCENNES RAILROAD CO.,
By W. D. JUDSON, *President.*

E. WALKER,
Solicitor.

Amended bill.

In the circuit court of the United States for the northern district of Illinois.

WILLIAM R. FOSDICK AND JAMES D. FISH
vs.
CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY et al. } In chancery.

The demurrer of the Chicago, Danville and Vincennes Railroad Company to the amended bill of complaint of William R. Fosdick and James D. Fish, complainants.

This defendant by protestation not confessing or acknowledging
100 all or any of the matters and things in the said amended bill of complaint, to be true in such manner and form as the same are therein and thereby set forth and alleged, as to so much of said amended bill of complaint, and on the eleventh page thereof, as charges that it will be impossible for said company to fulfill the conditions of said funding agreements, and that the holders of said certificates have the right to rescind said agreements; and to so much of the said amended bill, and on said page thereof, as charges that the principal of said bonds has become due and payable, this defendant doth demur thereto, and for cause of demurrer showeth that the said complainants have not by their said amended bill made such a case as entitles them, in a court of equity, to any relief from or against this defendant as to the matters hereinbefore specified or any of such matters.

Wherefore, and for divers other good causes of demurrer in the said amended bill contained, *as* to so much of the complainants' said amended bill as before is set forth, this defendant doth demur, and prays the judgment of this honorable court whether it shall be compelled to make

101 any further or other answer to such part of the said amended bill as is so demurred unto as aforesaid.

I certify that in my opinion the foregoing demurrer of the Chicago, Danville and Vincennes Railroad Company, defendant, to the amended bill of complaint of William R. Fosdick and James D. Fish, complainants, is well founded in law, and proper to be filed in the above cause.

E. WALKER,
Solicitor and of Counsel for Defendant.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Edwin Walker, being duly sworn, does depose and say that he is the attorney of the Chicago, Danville and Vincennes Railroad Company, the defendant named in the foregoing demurrer, and duly authorized and empowered as such attorney to make this affidavit in its behalf.

He further swears that he has read the foregoing demurrer to the amended bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

EDWIN WALKER.

102 Subscribed and sworn to before me Oct. 23, 1875.

E. A. DRUMMOND,
U. S. Com.

(Endorsed:) Filed Oct. 23, 1875. W'm H. Bradley, cl'k.

Afterwards, to wit, on the 6th day of January, A. D. 1876, the intervening bondholders, by their solicitors, filed in said clerk's office their petition in said entitled cause, which said petition is in the words and figures following, to wit:

Petition of intervening bondholders.

103 Circuit court of the United States, northern district of Illinois.

WILLIAM R. FOSDICK AND JAMES D. FISH
v.
THE CHICAGO, DANVILLE & VINCENNES RAILROAD COMPANY, and others. } In chancery.

Your petitioners, Stephen Osgood, Frederick W. Huidekoper, Thomas W. Shannon, John M. Dennison, George W. Gill, Alanson A. Sumner, Chandler Robbins, and William T. Hickok, respectfully show unto the court that they are the owners and holders of a large amount of the bonds and coupons issued by the defendant, the Chicago, Danville & Vincennes Railroad Company, the payment of which is secured by the execution and delivery of the trust deed or mortgage, dated March 10, 1869, and the supplementary trust deed or mortgage dated April 24th, 1872, both which trust deeds were duly executed, acknowledged, and delivered unto the said original complainants herein, William R. Fosdick and James D. Fish, as trustees, for the use, benefit, and behoof of your petitioners and all other bondholders of said issue of bonds.

And your petitioners further show that on the 27th day of February, 1875, the complainants filed their bill of complaint herein, alleging that in divers respects the conditions of said trust deeds had been broken by the said railroad company, and that it had forfeited all and singular its

title and estate in said mortgaged property, and that the said
104 corporation was insolvent, and praying that the said mortgage should be foreclosed and the property therein specified should be sold, under the orders of this court, to satisfy the principal and interest of the bonds issued under said mortgage, and that an account should be taken of the amount due on such securities.

And afterwards, to wit, on the day and year last aforesaid, the said Chicago, Danville & Vincennes Railroad Company duly entered its appearance to said action, and submitted itself to the jurisdiction of this court.

And afterwards, to wit, on the 14th day of September, 1875, the said complainants duly filed in this court their amended bill, praying the same relief as aforesaid, and the said railroad company hath filed its answer to said amended bill.

And these petitioners pray reference to the said original and amended bill of complaint and unto the said answer to said amended bill of complaint, as the same now remain upon the files of the court; and these petitioners aver that all and singular the statements and allegations of said amended bill of complaint touching the execution, delivery, and record of said trust mortgages, the non-payment of interest upon such bonds, the insolvency of said railroad company, and the breach of condition of said mortgages, are true as they are set out in said amended bill of complaint, and these petitioners pray the benefit of all and singular such allegations, to the same extent as though they had again specifically set them out at length in this petition.

And your petitioners also show that this court, upon the prayer of the said bill, appointed a receiver of all and singular the property of said railroad corporation, and has been and still is administering the property thereof so within its jurisdiction for the benefit of the creditors thereof, according to their several priorities.

And your petitioners show that the said line of railroad constructed and operated by the said corporation in the State of Illinois and Indiana has always been managed as one property, and the equipment has been used promiscuously over and upon each part of said road, and no separate accounts have been kept and preserved of the exact earnings, receipts, or operating expenditures on each division of said line, and that the entire first-mortgage bonded debt of said corporation is
$4,000,000, which bears interest at and upon the rate of 7 per
105 centum per annum, payable in gold coin, on the 1st days of April and October; that each such interest installment amounted to the sum of $140,000 gold, and the said corporation has not paid any portion of the coupons falling due Oct. 1, 1873, April 1, 1874, Oct. 1, 1874, and April 1, 1875, and has not been in the receipts of earnings, or funds from any source, to enable it to satisfy any portion of the principal of such four coupons.

And your petitioners show that on the first day of October, 1873, the said railroad corporation defaulted in the payment of interest on its bonds as aforesaid, and that large numbers of the coupons maturing on said day were presented at the office of the corporation, in the city of New York, and payment thereof duly demanded, and payment thereof was refused for want of funds, and the said corporation, by its board of directors, passed and recorded a resolve and published circulars to the bondholders, announcing the inability of said corporation to pay any portion of said current coupon falling due Oct. 1, '73, and also the three succeeding interest warrants due in April and October, 1874, and April, 1875.

And being so in default, and having broken the condition of said mortgages, the said railroad corporation, by its then board of directors, published a circular asking indulgence from its bondholders on the statements and conditions stated in the said original and amended bill herein, viz, that the said four coupons on the bonds were to be deposited in trust with a special trustee, and certificates to be issued for the principal thereof, payable February 1, 1879, with interest at 7 per cent., with the distinct agreement that in case of the non-payment of the interest on any such certificate on demand at any time when due, or in case of the non-payment of the coupons of the first-mortgage bonds due October 1, 1875, and on the first days of April and October in each succeeding year until said February 1, 1879, that the holder of said certificate should be entitled to surrender such certificate and receive and proceed against the corporation upon such original interest warrants deposited with the trustee. A copy of such circular and form of certificate is hereunto annexed and reference prayed thereto.

And your petitioners show that the statements of the said corporation and its officers presenting such funding scheme to the bond-cred-
106 itors were false and fraudulent, and largely concealed, and understated the indebtedness and concealed the embarrassed and insolvent condition of the corporation, and, also, that said Fosdick and Fish were cognizant of such statements and the nature thereof, and at the request of the corporation assisted in circulating the same among and procuring the assent of the bond-creditors, and were compensated therefor.

And relying upon the said statements, the holders of $409,000 out of said $560,000 principal of said four coupons, consented to such funding arrangement, but the holders of the remainder thereof never at any time consented to any extension of time, or in any manner agreed or barred themselves from proceeding against said corporation by reason of such original default, and your petitioner Osgood never at any time funded, or agreed to fund, any of the coupons on his said bonds.

And your petitioners show that the said Chicago, Danville and Vincennes Railroad Company was not at and before August 1, 1875, in such financial condition that it could pay the interest due upon the said scrip certificates, but the said corporation was then, and ever since has been, insolvent, and it did not pay or cause to be paid the said interest upon such scrip certificates, and as shown by the report of the receiver of this court the entire cash on hand on August 1, 1875, belonging to said corporation was only $426.03 in currency, with the pay-rolls and supply-bills from the previous month to be paid therefrom.

And your petitioners further show that the said railroad corporation became and was wholly insolvent at and before October 1, 1875, and that on that day it did not pay, or cause to be paid, the sum of $140,000, gold coin of the United States, due for interest upon the said first mortgage indebtedness of $4,000,000 in gold, although large numbers of such coupons were presented for payment at the said company's agency in New York, and payment demanded and refused, and in truth and fact the entire cash in hands of the receiver belonging to said corporation at said October 1, 1875, and available for such interest payment would not exceed about one-tenth part of what was then and there due for such interest installment, and for the want of such funds, the said $140,000 gold coin, due October 1, 1875, from said railroad company, remains wholly unpaid and due unto your petitioners and others, the holders of said bonds, and by reason of such insolvency and default the said
107 funding scheme has become wholly inoperative and void as to those

who accepted it solely upon the conditions as aforesaid, and by reason of such default in the payment of said interest warrant due October 1, 1875, and the insolvency of said corporation, all such persons who consented to the extension of payment until 1879 of said four previous coupons, are now in equity, and according to such trust, entitled to enforce the same against said company in all respects as though the said funding agreement had never been by them assented to, and very many of the said bondholders who had been induced to accept such scrip certificates have notified said trustee since October 1, 1875, that by reason of such default and insolvency, they claimed recourse upon their coupons held in trust by him and tendered back the said certificates.

And your petitioners claim that by reason of such default and insolvency the entire amount of said five coupons amounting to $700,000 in gold is now due for interest alone upon the said first mortgage liability of said corporation.

And your petitioners further show that demand was also made at the office of said corporation in New York in December, 1874, for the payment of sundry coupons due April 1, 1874, and which were never funded or agreed to be so, and that payment thereof was refused, and the said presentment and non-payment was duly evidenced by a public instrument of protest by a notary public in and for said county and city of New York, and the said coupons still remain unpaid, and more than six months having expired since the demand of payment of said coupons in October, 1873, and the default thereon, and more than six months having also expired since the demand of payment of such coupons in December, 1874, and the default thereupon, your petitioners claim that, by the conditions of said conveyances, the said principal of all and singular the said bonds has also become due, and that there is now due and owing by the said corporation the full sum of $4,700,000 upon said first-mortgage indebtedness.

And your petitioners show that as to the said supplemental mortgage dated April 24, 1872, both the said James W. Elwell and James D. Fish, who were trustees in said later mortgage of January 1, 1873, were both directors of said corporation at both said dates, and when they accepted the trusts of said later conveyance were both personally cognizant of the existence, terms, and delivery of said conveyance of April 24,
108 1872, and had voted for its execution and delivery as directors of said railroad corporation.

And in that behalf your petitioners show that if said Fish has in fact ever resigned his trust under said mortgage of January 1, 1873, that such resignation was made after the institution of this action, and was colorably done under the advice of counsel so that he might be better able to maintain himself in his position as trustee in the said first mortgage as aforesaid, against the wishes of a majority of the bondholders.

And notwithstanding such resignation, the said Fish has a direct hostile interest against his cestui que trusts, for that the said Fish is now and for some time has been the president and a large stockholder in the Marine Bank of New York City, which said corporation has for about two years last past been a holder of $180,000 of such convertible bonds, and, therefore, directly and materially interested to defeat, delay, and lessen the security and recovery of your petitioners.

And your petitioners show that the capital stock of said railroad corporation is limited by its charter to $5,000,000, and that prior to January 12, 1875, the said bonded debt authorized to be issued, and then outstanding, was the sum of $5,000,000, and that in and by the charter of the said corporation, its power of borrowing money on bond and

mortgage is expressly limited to the amount of its authorized capital stock; and your petitioners further show that the said chattel mortgage and bonds of January 12, 1875, recited in the bill of complaint herein, were never authorized to be issued or executed by any vote of the stockholders as required by law, and that with the exception of $30,000 of said chattel-mortgage bonds now held as collateral by N. S. Bouton on a loan of $12,000, none of said chattel-mortgage bonds are held in good faith and for value and in the usual course of business, but that the same are held as follows: E. C. Bozart, $25,000, bonds; A. T. Chur, $31,000, bonds; Marine Bank of New York, $100,000, bonds; W. B. Stevens, $20,000, bonds; each and all such bonds being held as collateral security for debts existing prior to such issue and delivery of bonds, they being merely received as additional security and without any consideration paid at the time; and there are also others held by W. D. Judson and Amos Tenney, $624,000, bonds, $200,000 of which are claimed to
109 be held by them as collateral security for a certain mortgage by them previously executed, and $424,000 being claimed to be held as collateral security for their precedent endorsements of the notes of the said railroad company, and also $100,000, other of such bonds held by W. B. Stevens, claimed to be held by him as collateral security for the benefit of the holders of convertible mortgage bonds then outstanding.

And your petitioners claim that as to the said bonds held by the said Marine Bank of New York, they were actually taken and received by the said Fish, as the officer thereof, or with his knowledge and consent, after the filing of the bill herein, and that his interest in such $100,000, bonds, is hostile to the interest of your petitioners and all other bondholders; and your petitioners claim that the said chattel mortgage and bonds are, for the reasons aforesaid, illegal, fraudulent, and void, and do not constitute any valid or prior lien on any part of said property as against the liens of your petitioners.

And further in that behalf your petitioners show that in and by the mortgage of March 10, 1869, it is provided that the lien thereof shall attach to all property, real and personal, which the said corporation then owned or might thereafter acquire in law or equity, of any kind whatever, appurtenant to said railroad; and said corporation did further covenant that, to better secure and confirm the title of said trustees in and to all property which might thereafter be acquired by it, as appurtenant to said railroad, *as* it would, as often as it might be lawfully required by said trustees, make such further conveyances and assurances as might be necessary to better carry out the said trust; and notwithstanding such grants and covenants in said trust-mortgage, and that both said Fish and Fosdick were personally cognizant of the fact that the said corporation had acquired a large amount of equipment, engines, cars, and tools since the said delivery of said conveyance to them in 1869, they wholly failed, neglected, and refused to discharge their duties as trustees in that regard, or to demand or procure any conveyance or assurance whatever from the said mortgagor corporation, in order to more fully and completely vest in them, for the use of your petitioners and others, an indefeasible title to such after-acquired property, but, on the contrary thereof, the said Fish, as a director of said corporation, voted for the execution of said chattel-mortgage, directly against the interests of such bondholders, and both said trustees have per-
110 mitted the said bonds to be disposed of and appropriated in the manner and upon the considerations and by the persons and corporations aforesaid, without attempting to prevent the same.

And your petitioners show that at the date when the said trust-mortgage of March 10, 1869, was executed and delivered, that the said covenant and condition thereof extending the lien thereof to after-acquired property, as a paramount and prior claim, was a valid continuing covenant, binding all equipment whenever acquired, and that, by the judgment of the court of highest resort in said State of Illinois, there had been a fixed rule of interpretation validating and effectuating such covenant, and your petitioners and others purchased their securities, relying upon the validity and interpretation of such covenant, and your petitioners therefore claim that no law of a date subsequent to such covenant and mortgage can in any manner be invoked or be operative to impair the lien and security of such contract with them, and that, for the reasons and upon the facts aforesaid, your petitioners and the other first-mortgage bondholders of said railroad company have a lien and claim upon all and singular the property of said corporation of every kind, real and personal, now in existence on the line of railroad, and the income therefrom, which is, in equity, prior and superior to the claim of any other creditors whatsoever, and they pray that the court will so find and decree.

And as to the claim and pretense of the said railroad corporation and its officers, that its net earnings have been and are sufficient to discharge and satisfy the interest upon the said bonded debt, and that for such reason a foreclosure will not be decreed, these petitioners aver that said pretense is wholly false, and in that behalf show to the court that on October 1, 1875, there was due, for current interest on the first-mortgage bond debt of $4,000,000, an installment of $140,000 in gold, which had never been funded or agreed so to be; that the entire amount of cash on hand, held by the receiver, was only $27,766.66 in currency, with the previous month's bills, his own salary, and divers rentals to be deducted therefrom and paid out of such balance.

And your petitioners would further show that prior to the default in interest on the bonded debt, on October 1, 1873, the said corporation stated that it owed a floating debt, as follows:

111	For loans on bonds	$396,000
	For engines and cars	254,000
	For supplies and labor, etc	156,000
	Or a total of only	$806,000

That since said date, though the corporation now claims it has been in receipt of large net earnings, it has not therefrom paid any interest on its first-mortgage bonds, but the unpaid and past-due interest on such prior debt has accumulated until it is now represented by five coupons of $140,000 each, or $700,000 gold, or about $798,000 currency, and in addition thereto the receiver officially reports to this court that the floating debt of said corporation, on June 1, 1875, was as follows:

On operating account	$230,255	24
On construction account	92,889	22
On rolling-stock	377,307	40
On money borrowed	435,606	80
Or a total of	$1,136,058	66

showing an increase of floating liability since October 1, 1873, of $330,058.66, and adding to that sum the arrears of interest accrued during that period, as aforesaid, making an aggregate increase of indebtedness since October 1, 1873, of about $1,128,058.66, currency.

And these petitioners show that, in truth and fact, the said corporation defendant did not even pay the interest on its funding script due on August, 1874, and February, 1875, out of any net revenue earned by it, by the operations of its road, but that it was forced to raise the first installment by procuring the sale of certain Chicago and Southern Railroad Company's bonds, charged upon its books as being sold to it by J. E. Young & Co., and the last installment was paid out of money which it borrowed for the purpose, and for which the said corporation's paper is still outstanding.

And your petitioners show that said corporation is hopelessly insolvent, that it has no real or substantial interest in the property covered by said mortgages, and that the revenues and incomes actually derived from the operations of said road, as shown by its books and the receiver's reports and accounts, are entirely inadequate to satisfy the current
112 interest or the arrears of interest due to your petitioners and other bond-creditors, or even any considerable fraction thereof; and that although they are entitled to the prior claim upon all said property and its income, *that* they are not in fact in the receipt of any sums whatever upon their several demands, and the aggregate of their said debt is constantly and largely increasing; and your petitioners claim that it would be grossly inequitable to refuse, on the false pretense of their bankrupt debtor, to delay in ordering the sale of said mortgaged property so that they may be able to realize some portion of their demands.

Your petitioners, therefore, pray that the court will entertain this petition and will ascertain the facts thereof, and will speed this cause and direct an account to be forthwith taken of the sums due on such first mortgage to your petitioners and others, and will decree the payment thereof; and that such amount constitutes a first lien on all and singular the property, real and personal, of said corporation and its income in the hands of the receiver, and direct the sale thereof by the master of this court to satisfy the said sums so ascertained and adjudged to be due; and your petitioners pray for all further and other relief that may be necessary to secure the rights of themselves and all the first-mortgage bondholders of said corporation and as this court may be competent to award by reason of the premises.

STEPHEN OSGOOD,
F. W. HUIDEKOPER,
AND OTHERS,
Petitioners.

H. CRAWFORD,
J. E. MCDONALD,
Solicitors.

(Endorsed:) Filed January 6, 1876. Wm. H. Bradley, clerk.

113 And on the same day, to wit, the 6th day of January, A. D. 1876, in the record of the proceedings of said court in said entitled cause, before the Hon. Thomas Drummond, judge, is the following entry, to wit:

WILLIAM R. FOSDICK ET AL.
vs.
THE CHICAGO, DANVILLE AND VINCENNES RAILroad Company et al. } In chancery.

On motion, leave is given Stephen Osgood et al. to file petition herein without prejudice, and, the same being now filed, it is ordered by the

court that the same be referred to Henry W. Bishop, esq., master in chancery of this court, to take proofs thereon, and report the same to the court.

114 Afterwards, to wit, on the 27th day of January, A. D. 1876, one Michael Schall, by his solicitor, filed in said clerk's office his intervening petition in said entitled cause, which said intervening petition is in the words and figures following, to wit:

Intervening petition of Michael Schall.

In the circuit court of the United States for the northern district of Illinois.

WILLIAM R. FOSDICK ET AL.
v.
CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY et al. } In chancery.

To the honorable the judge of said court in chancery sitting:

The intervening petition of Michael Schall, of York, Pennsylvania, respectfully represents unto your honors that on or about the 1st day of February, A. D. 1873, he entered into a contract with the Chicago, Danville and Vincennes Railroad Company to furnish the said road 225 coal-cars, at the rate of $700 per car, delivered at Pittsburgh, Pa., the said railroad company paying freight from York to Pittsburgh, Pa., which was to be deducted from the purchase-price. By the terms of the contract, the cars were to be delivered in lots of twenty-five,
115 and on the delivery of each lot payment to the amount of $20 per car was to be made in cash, and notes for a like amount were to be given, the first payable in 60 days, and one monthly thereafter until all were paid.

Your petitioner further represents that the said cars were delivered under the said contract, and notes given in accordance with the provisions of the same, and that payments to the amount of $44,323.43 have been made on account of said contract, $28,883.18 having been paid in cash and $15,440.25 in second-mortgage bonds of the said road, leaving still due on the contract $110,336.14, or an average of $490.38 per car.

Your petitioner further represents that by the terms of said contract the title to said cars was to remain in your petitioner, and not to vest in the said railroad company until the whole purchase-price was paid.

Your petitioner further represents that the last payment on said contract was made on the 14th day of October, 1874, and that your petitioner has received no payment from said railroad since that date, though the rental of said cars has been paid by Adna Anderson, the receiver, since he has held possession of and used the same as such receiver.

116 Your petitioner further represents that said cars have been used by said railroad company since the delivery of the same, and the money your petitioner has received will amount to no more than a fair rental for said cars to the 22d of August, 1874.

And your petitioner further represents that Brown and Hammond, the former receivers of said road, used the said cars while they were in possession of the same, for all of which use your petitioner has received no compensation.

Your petitioner further represents that $7 per car per month would

be a fair compensation for the use of said cars from the 22d day of August, 1874, to the 1st day of May, A. D. 1875, the date when the receiver appointed by this court took possession, since which time the rental has been regularly paid.

Your petitioner prays that an order may be entered directing the payment of his claim out of any funds not otherwise appropriated, and that said cars may be ordered to be delivered up to your petitioner.

And as in duty bound your petitioners will ever pray.

MICHAEL SCHALL,
By his attorney, R. BIDDLE ROBERTS.

117 (Endorsed:) Filed Jan. 27, 1876. W'm H. Bradley, cl'k.

On the same day, to wit, on the 27th day of January, A. D. 1876, said complainants and intervening bondholders, by their solicitor, filed in said clerk's office their answer to said intervening petition of Michael Schall; which said answer is in the words and figures following, to wit:

Answer to intervening petition of Michael Schall.

U. S. circuit court, northern district of Illinois.

WILLIAM R. FOSDICK AND JAMES D. FISH
vs.
THE CHICAGO, DANVILLE AND VINCENNES Railroad Company.

In the matter of the intervening petition of Michael Schall.

The complainant', William R. Fosdick and James D. Fish, and the intervening bondholders, Frederick W. Huidekoper, John W. Denison, Thomas W. Shannon, who have been by order of the court duly admitted as parties herein to protect their interests, for answer to the petition filed herein by the said Michael Schall, say:

118 That all and singular the railroad-cars mentioned in the said petition were sold and delivered unto the Chicago, Danville and Vincennes Railroad Company prior to the institution of this action. That such sale and delivery was made by virtue of a certain written agreement, a copy of which is herewith filed, marked "Exhibit A," and made a part of this answer.

That upon such sale and delivery of the said railroad-cars to the said railroad company, the title thereto passed to said corporation and became subject to the lien of the mortgage set out in the complainants' bill and prayed to be foreclosed in this action; and that ever since the title to said cars so became vested in the said railroad company the said mortgage last above mentioned has constituted, and does still constitute, the first and paramount lien on said cars.

And these respondents deny the allegations of the said petition as to the ownership of said cars, and do aver that the said petitioner is not the owner thereof or entitled to the possession thereof; nor does the petitioner have any claim in law or equity to the said personal property.

119 And these respondents further deny that the said petitioners have any valid claim or lien upon said cars or any of them under

the laws of the State of Illinois, for that the said written agreement aforesaid, under which alone it claims title, was not executed, acknowledged, or recorded in such manner as is required by the laws of Illinois, in order to constitute a valid chattel-mortgage, and these respondents claim that such unrecorded and unacknowledged chattel-mortgage is as to them wholly void.

Respondents further show that the possession of said railroad-cars was delivered to said railroad company about the date of said writing, and it so continued in the open possession and use of said cars until the receiver was appointed in this action, and since, hitherto, the said receiver has been in possession and use of said cars; and respondents further claim that ever since the institution of this action the first-mortgage bondholders have become entitled to the income and earnings of the said mortgaged property, and they deny the right of the said petitioner to appropriate any part of the income belonging to the first-mortgage bondholders to the payment of any pretended claim either
120 for the purchase-price of said cars or for the assumed rent thereof.

Respondents deny that the mortgaged property, or the income thereof, received by the officer of this court, or the proceeds of any sale under foreclosure, can be appropriated to the payment of any pretended claim of rent either pending or prior to the institution of this action.

Respondents submit that the receiver of this court cannot lawfully be instructed to take the income of the bondholders to purchase property which is already subject to their lien as the property of the mortgagor, and therefor they pray that this court refuse to make any order of allowance to the petitioner for rent or purchase of said cars or for a redelivery of them to said petitioner, or directing their purchase on any terms by the receiver; and they pray that the petition be dismissed with costs.

W. R. FOSDICK, &c., *Trustee.*
F. W. HUIDEKOPER,
And others, intervening bondholders.

H. CRAWFORD,
Solicitor.

(Endorsed:) Filed Jan. 27, 1876. W'm H. Bradley, clerk.

121 And on the same day, to wit, the 27th day of January, A. D. 1876, in the record of the proceedings of said court in said entitled cause, before the Hon. Thomas Drummond, judge, is the following entry, to wit:

WILLIAM R. FOSDICK ET AL.
v.
CHICAGO, DANVILLE AND VINCENNES RAILROAD CO. et al. } In chancery.

On motion, leave is given Michael Schall to file intervening petition herein, and thereupon the same is referred to H. W. Bishop, master, to report thereon to the court.

Afterwards, to wit, on the 5th day of December, A. D. 1876, in the record of the proceedings of said court in said entitled cause, before the Hon. Thomas Drummond, judge, is the following entry, to wit:

122 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court thereof.

WILLIAM R. FOSDICK AND JAMES D. FISH, complainants,
vs.
THE CHICAGO, DANVILLE & VINCENNES Railroad Company, James Elwell, and R. Biddle Roberts, defendants.
} In chancery.

Decree.

It appearing to the court that the said several defendants have entered their appearance, and filed their several answers in said cause, and that the said complainants have filed their replications to the said several answers, and that heretofore the said cause was by order of said court referred to Henry W. Bishop, the master in chancery of said court, to take proofs and report, and that the report of said master was made and filed in said cause on the 24th day of June, A. D. 1876, and that the exceptions to said report have been and are overruled by the court:

Now, this day, this cause came on to be heard upon the said bill, the answers of said defendants, and the replications thereto, and the report of said master, and proofs taken in open court;

And it appearing to the court that the said defendant, the Chicago, Danville and Vincennes Railroad Company, was organized as a corporation, under and by virtue of the laws of the State of Illinois, during the year A. D. 1865, and from thence hitherto has been and still is such
123 corporation, and that as such corporation it was authorized to borrow money, and execute its bonds therefor with interest coupons annexed, and secure the payment of the same by mortgage or deed of trust upon its railroad and property then existing or afterwards to be acquired;

And it further appearing to the court that heretofore, and on the 10th day of March, A. D. 1869, the said railroad company caused to be executed and issued twenty-five hundred (2,500) bonds, numbered from one (1) to twenty-five hundred (2500), both inclusive, each for the sum of one thousand (1,000) dollars, payable in gold coin on the first day of April, in the year nineteen hundred and nine (1909), with interest at the rate of seven (7) per cent. per annum in gold coin, payable semi-annually on the first days of April and October in each year, and that to secure payment of said bonds and the interest coupons thereto attached, the said railroad company, on the said 10th day of March, A. D. 1869, executed and delivered to the said complainants, William R. Fosdick and James D. Fish, as trustees, a mortgage, or deed of trust, of even date with the said bonds, in and by which the said railroad company conveyed to the said trustees all and singular the entire railroad of the said railroad company, lying, being, and extending from its terminus in the city of Chicago, in Cook County, Illinois, southerly through the counties of Cook, Will, Kankakee, Iroquois, and Vermillion, to the city of Danville, and thence southeasterly to a point on the State line of the State of Indiana, joining and connecting at said point with the Evansv'lle, Terre Haute and Chicago Railroad, being in length about one hundred and forty (140) miles, with all its franchises, equipments, property, tolls, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods, and chattels connected with or used in the using or operating of said railroad or appurtenant thereto, and all its rails, ties,

fuel, fencing, and erections, and all its rights of way and easements, and all cars, engines, and tools, and all rents, reservations, and reversions of every nature and kind whatever, including all the property between said terminal points which said railroad company then owned and possessed, or might thereafter acquire, either in law or equity, of every kind whatever, appurtenant thereto;

And it further appearing to the court that the said deed of trust, so executed and delivered to them as aforesaid, was by them thereafter, and during the said month of March, A. D. 1869, duly filed for record and recorded in each of said counties of Cook, Will, Kankakee, Iroquois, and Vermillion, in the State of Illinois, and thereby then and there became, and was and still is, a first lien upon all of the railroad, property, franchises, and appurtenances in said deed of trust described;

And it further appearing to the court that the said railroad company had, long prior to the filing of the bill in said cause, sold and disposed of all of the twenty-five hundred bonds secured by said deed of trust,
124 and that the same, and the coupons thereto attached, were then and there all outstanding and valid obligations of said railroad company, and secured to be paid by the said trust-deed;

And it further appearing to the court that heretofore and on the 4th day of March, A. D. 1872, the said Chicago, Danville and Vincennes Railroad Company entered into articles of consolidation with the Rossville and Indiana Railroad Company, which was then and there a corporation of the State of Illinois, whereby the said two corporations became and were consolidated under the name and style of the Chicago, Danville and Vincennes Railroad Company;

And that thereafter and on the 9th day of March, A. D. 1872, the said last-named company entered into articles of consolidation with the Western Indiana Railroad Company, which was then and there a corporation organized and existing under the general laws of the State of Indiana, by which said articles the said two corporations became and were a consolidated corporation by the name and style of the Chicago, Danville and Vincennes Railroad Company, and became, and was then and there, and from thence hitherto has been and still is a corporation in the State of Indiana as well as in the State of Illinois; and as such corporation of the State of Indiana was authorized to construct, maintain, and operate a line of railroad extending from the boundary-line between the States of Indiana and Illinois, at a point in Warren County, southwardly through the counties of Warren, Fountain, Parke, and Clay, to the town of Brazil in said last-named county, with branches to coal-mines, and other appurtenances;

And it further appearing to the court that thereafter, and on the 12th day of March, A. D. 1872, the said consolidated corporation, for the purpose of providing means to construct and equip the line of said company in Indiana, caused to be executed fifteen hundred (1,500) bonds, each for the sum of one thousand dollars, payable on the first day of April in the year nineteen hundred and twelve (1912), with interest at the rate of seven (7) per cent. per annum, both principal and interest payable in American gold coin, which said bonds were numbered from 2501 to 4000, inclusive, and were of the same form as the said Illinois division bonds, and had similar coupons attached;

And it further appearing to the court that for the purpose of securing the payment of said Indiana division bonds, the said railroad company on the said 12th day of March, A. D. 1872, executed and delivered to the complainants, William R. Fosdick and James D. Fish, as trustees, its certain mortgage or deed of trust, in and by which the said railroad

company conveyed to the said trustees all and singular the entire railroad of said railroad company, situate, lying, and being in the State of Indiana, commencing on the boundary-line between the States of Illinois and Indiana, in the township of Marshfield, and county of Warren, in the State of Indiana, at the point where it connects with the road of the said company terminating on the eastern boundary-line of the State of Illinois, in the town of Ross, in Vermillion County, in said last-named State, and distant about ten
125 miles southeasterly from the village of Rossville, extending thence in a southeasterly direction to Covington, in Fountain County, thence southerly to Montezuma, in Parke County, and thence southeasterly to Brazil, in Clay County, on the line of the Terre Haute and Indianapolis Railroad; also, a branch road, extending from the main line before described, commencing at a point on said main line distant about three miles south from Covington, in Fountain County, and extending in an easterly direction to the village of Newburgh, in said county, the entire length of road being about eighty miles; and also all such additional branch roads as said railroad company might thereafter construct, for the purpose of extending its tracks into the coal and mining regions in the vicinity of said main lines of road, with all its franchises, equipments, property, tolls, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods, and chattels, connected with or used in the using or operating of said railroad, or appurtenant thereto, and all its rails, ties, fuel, fencing, and erections, and all its rights of way and easements, and all cars, engines, and tools, and all rents, reservations, and reversions of every nature and kind whatever, including all the property between said terminal points which said company then had or owned and possessed, or might thereafter acquire, either in law or equity, of every kind whatever appurtenant thereto;

And it further appearing to the court that the said trust-deed was thereafter, and during the month of March, A. D. 1872, duly recorded in each of the counties of Warren, Fountain, Parke, and Clay, in the State of Indiana, and then and thereby became and was, and still is, a first lien upon all of the railroad, property, franchises, and appurtenances in said trust-deed described;

And it further appearing to the court that of the said fifteen hundred bonds there had been issued and sold, prior to the filing of the bill in this cause, twelve hundred and forty-three (1243) thereof, and that the remaining two hundred and fifty-seven (257) of said fifteen hundred bonds had been issued and pledged as collateral to certain floating indebtedness of said company, and that all of the said fifteen hundred bonds, and the coupons thereto attached, are still outstanding and secured by the said last-mentioned trust-deed;

And it further appearing to the court that thereafter, and on the 24th day of April, A. D. 1872, the said railroad company executed and delivered to the said complainants, as trustees, a certain mortgage or trust-deed, of that date, in and by which the said railroad company then and there conveyed to the said complainants, for the purpose of more fully securing and assuring the punctual payment of the said two millions five hundred thousand dollars of bonds hereinbefore mentioned as numbered from one (1) to twenty-five hundred (2500), both inclusive, dated March 10th, 1869, and due April 1st, 1909, all and singular the entire division of the railroad of the said company, situate, lying, and being in the State of Indiana, commencing on the boundary-line between the States of Illinois and Indiana,

126 in the township of Marshfield and county of Warren, in the State of Indiana, at the point where it connects with the road of the said company, terminating on the eastern boundary line of the State of Illinois, in the town of Ross, in Vermillion County, in said last-named State, and distant about ten miles southeasterly from the village of Rossville, extending thence in a southeasterly direction to Covington, in Fountain County, thence southerly to Montezuma, in Parke County, and thence southeasterly to Brazil, in Clay County, on the line of the Terre Haute and Indianapolis Railroad; also, a branch road extending from the main line before described, commencing at a point on said main line distant about three miles south from Covington, in Fountain County, and extending in an easterly direction to the village of Newburg, in said county, the entire length of road being about eighty miles; and also all such additional branch roads as said company might thereafter construct in the State of Indiana, for the purpose of extending its tracks into the coal and mining regions in the vicinity of said main lines of road, with all its franchises, equipments, property, tolls, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods, and chattels, connected with or used in the using or operating of said railroad, or appurtenant thereto, and all its rails, ties, fuel, fencing, and erections, and all its rights of way and easements, and all cars, engines, and tools, and all rents, reservations, and reversions of every nature and kind whatever, including all the property between said terminal points which said company then had or owned and possessed, or might thereafter acquire, either in law or equity, of every kind whatever, appurtenant thereto;

And it further appearing to the court that in and by the said last-mentioned trust-deed the said railroad company, for the purpose of more fully securing and assuring the punctual payment of the said one million five hundred thousand dollars of bonds hereinbefore mentioned as numbered from twenty-five hundred and one (2501) to four thousand (4000), inclusive, dated March 12th, 1872, and due April 1st, nineteen hundred and twelve (1912), and the interest thereon, also conveyed to the said complainants, as trustees, all and singular the entire railroad of the said company, lying, being, and extending from its terminus, in the city of Chicago, in Cook County, Illinois, southerly through the counties of Cook, Will, Kankakee, Iroquois, and Vermillion, to the city of Danville, being in length about one hundred and thirty miles, with all its franchises, equipments, property, tolls, issues, and profits, and all its lands, tenements, buildings, fixtures, machinery, goods, and chattels, connected with or used in the using or operating of said railroad, or appurtenant thereto, and all its rails, ties, fuel, fencing, and erections, and all its rights of way and easements, and all cars, engines, and tools, and all rents, reservations, and reversions of every nature and kind whatever, including all the property between said terminal points which said company then had or owned and possessed, or might thereafter acquire, either in law or equity, of every kind whatever, appurtenant thereto;

127 And it further appearing to the court that the said trust-deed was duly delivered to said trustees and accepted by them as further security for the uses and purposes therein expressed, and that it then and there became and was a second lien upon all of the said railroad, property, franchises, and appurtenances in the State of Indiana in the said deed described, as security for the payment of the said twenty-five hundred bonds, numbered from one (1) to twenty-five hundred (2500), both inclusive, and that the said mortgage then and there

became and was a second lien on the line of railroad of said company in the State of Illinois, and the franchises and appurtenances thereof, as in the said trust-deed described, as security for the payment of the said fifteen hundred bonds numbered from twenty-five hundred and one (2501) to four thousand (4000), both inclusive, except as provided by the last clause of said deed, which was and is as follows:

"The foregoing grants, conveyances, and covenants in this indenture contained, are made and entered into by the Chicago, Danville and Vincennes Railroad Company, party of the first part hereto, upon the express understanding, agreement, and condition that in case the party of the first part, or its successors or assigns, shall deem it necessary or desirable, at any future time, in consequence of an increase of the traffic of the said railroad, to issue and dispose of any amount of bonds, or other evidences of indebtedness, for the purpose of providing the means for the purchase of additional rolling-stock and equipment for the use of said railroad, or of said company, its successors or assigns, or for the improvement of said railroad or property, that then, and in that case, the said Chicago, Danville and Vincennes Railroad Company, its successors or assigns, may secure the payment of the principal and interest of such bonds or other evidences of indebtedness so issued and disposed of, by mortgage upon all the roads and property of said company hereinbefore mentioned and described, and that such mortgage, when so made and executed, shall constitute and be and become a lien upon all said roads and property prior to and having precedence of the liens hereinbefore provided for by this instrument;"

And it further appearing to the court that of the lines of railroad in said several mortgages described, there had been constructed and put in use by the said company within the State of Illinois at the time of the filing of the bill in this cause, that portion of the line commencing at Dalton, about twenty (20) miles south of the city of Chicago, and running thence southerly to Danville, in the county of Vermillion, a distance of one hundred and eight (108) miles, with a branch from Bismarck (a point on the main line in said Vermillion County), southeasterly to the line between the States of Indiana and Illinois, a distance of four and six-tenths ($4\frac{6}{10}$) miles, and that there was also owned and operated by said company terminal tracks and sidings within and near the city of Chicago, of the aggregate length of seven and eighty one-hundredths miles ($7\frac{80}{100}$), with the appurtenances thereto, making a total length of line in the State of Illinois of about one
128 hundred and twenty and four-tenths ($120\frac{4}{10}$) miles, and that said company has acquired for the uses and purposes of said railroad and the operation thereof, within the said city of Chicago, the south eighteen (18) feet of lot twelve (12), lot thirteen (13), and lot sixteen (16) in block thirteen (13), and lot six (6) in block nine (9), Carpenter's addition to Chicago; lot twenty-four (24) in block seven (7), Carpenter's addition, subject to an encumbrance of twenty-five hundred (2,500) dollars, lots twenty-nine (29), thirty (30), and thirty-two (32), in block (4), Magie and High's addition to Chicago, with six hundred and eighty (680) feet of the tracks hereinbefore mentioned, situated thereon, and also with an engine-house thereon; said lots twenty-nine (29), thirty (30), and thirty-two (32) being subject to an encumbrance of about twenty-three hundred (2,300) dollars, and also a leasehold interest in lot thirty-one (31) in said block four (4), Magie and High's addition to Chicago; the remaining tracks within said city being upon ground not owned by said company, but which it has the right to occupy under contract, and that the tracks near said city hereinbefore mentioned are three and five

one-hundredths miles in length, and situate on the right of way of the Chicago and Southern Railroad Company, under contract with it;

And it further appearing to the court that the said Chicago, Danvile and Vincennes Railroad also owns an undivided interest in an engine-house of fourteen (14) stalls, situate on the grounds of the said Chicago and Southern Railroad Company at Corwith, adjacent to the city of Chicago, also a water-tank on the ground of said Chicago and Southern Railroad Company near the Chicago River, and that the said company also uses the tracks of the Chicago and Southern Railroad Company, and of the Pittsburg, Cincinnati & S't Louis Railway Company from Thornton, near the terminus of its line, to its terminal tracks in Chicago, under contracts with said companies severally; and that all of the line so constructed and in operation within the said State of Illinois, together with the contract rights of said company in the use of the tracks of the said Chicago and Southern Railroad Company, and the said Pittsburgh, Cincinnati and S't Louis Railway Company from said Thornton to Chicago, constitute the Illinois division of the said railroad, and with the franchises, property, and appurtenances thereof, and its rolling-stock, tools, and fixtures, was and is all included within and a part of the premises conveyed to said complainants as trustees by the said trust-deed, dated March 10th, 1869, and that the said trust-deed is a first lien thereon as security for the payment of the bonds and coupons therein and hereinbefore mentioned and described;

And it further appearing to the court that the said company, at the time of the filing of said bill, had constructed and put in operation its line of road from a point on the State-line between the States of Illinois and Indiana, where the Bismarck Branch of the Illinois division intersects the same, to Snoddy's Mills or Coal Creek, a distance of nineteen and five-tenths (19$\frac{5}{10}$) miles, with various branches to coal-mines aggregating one and sixty-three one-hundredths (1$\frac{63}{100}$) miles in
129 length, and that the line of road from Snoddy's Mills to Montezuma, a distance of about eighteen (18) miles, is partly constructed, and the line from Montezuma to the Brazil coal-field, a distance of about twenty-five (25) miles, is nearly completed except track, and that about two miles of track was laid thereon, making total of twenty-three and thirteen one-hundredths miles of completed road, and forty-three (43) miles of partially completed road in the State of Indiana, and constituting the Indiana division of said railroad, which, together with the franchises, property, and appurtenances thereof, and its rolling stock, tools, and fixtures, was and is included within and a part of the premises conveyed to said complainants as trustees, by the said trust-deed of March 12th, 1872, and that said last-mentioned trust-deed is a first lien thereon as a security for the payment of the said fifteen hundred bonds and the coupons thereof in said trust-deed described;

And it further appearing to the court that the said railroad company at the time of the filing of said bill owned and had in use a large amount of rolling-stock upon the said line of railroad in the States of Indiana and Illinois, all of which was and is covered by and described in the said several mortgages, and that of the said rolling-stock the portion belonging to the said Illinois division, and now in the possession of the receiver appointed in this case, is as follows:

Twenty-five (25) locomotives, numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 21, 22, 24, 30, 31, 32, 33, and 34.

Six (6) passenger-cars, numbered 3, 4, 5, 6, 7, and 8.

Three (3) baggage-cars, numbered 2, 3, and 4.

Three (3) mail-cars, numbered 1, 3, and 4.

Eight (8) caboose-cars, numbered 3, 4, 5, 6, 7, 8, 9, and 10.

One hundred and sixty-one (161) box-cars, being those bearing numbers between 564 to 615, both inclusive, and 1001 to 1115, both inclusive.

Eighty-five (85) box-cars (Adams), numbered 1136 to 1220, both inclusive.

Three hundred and eighteen (318) coal-cars, being those bearing numbers between 1 to 100, both inclusive, and between 145 to 376, both inclusive.

One hundred and eighteen (118) block coal cars, being those bearing numbers between 01 to 0119, both inclusive.

Thirty-four (34) stock-cars, being those bearing numbers between 501 to 534, both inclusive;

And it further appearing to the court that the said railroad company has paid all of the coupons which became due on the said Illinois and Indiana division bonds, up to and including those which fell due on the first of April, A. D. 1873, and that none of the coupons which have matured since that time have been paid;

And it further appearing to the court that after said railroad company had made default in the payment of the coupons of the said
130 bonds maturing October 1st, 1873, and, to wit, on the 11th day of November, 1873, the said railroad company issued a circular to its bondholders, in and by which it proposed that the holders of bonds should deposit with complainant, William R. Fosdick, as trustee, the coupons due October 1st, 1873, April 1st, 1874, October 1st, 1874, and April 1st, 1875, and receive in exchange therefor the convertible bonds of said railroad company, dated January 1st, 1873, payable February 1st, 1893, bearing interest at seven (7) per cent. per annum, with coupons payable the 1st of February and August of each year, principal and interest in gold; said bonds to bear interest from February 1st, 1874, and to be received by the bondholders at seventy-five (75) per cent. of their par value; also scrip certificates bearing interest the same as the bonds to be issued for fractional sums, and exchangeable for the convertible bonds, when presented in sums of five hundred (500) or one thousand (1,000) dollars; the coupons thus deposited in trust to be held by the trustee until October 1st, 1876, after which the coupons to be canceled by the trustee and surrendered to the company, but in case of non-payment of any coupons coming due up to October 1st, 1876, the coupons deposited with the trustee were to be surrendered to the original owners upon the return of the second-mortgage bonds, or scrip certificates which had been issued for them;

And it further appearing to the court that in response to said proposition the holders of two hundred and seventy-one thousand five hundred dollars ($271,500) of said Illinois bonds, placed in the hands of said Fosdick, as trustee, the coupons thereof, which fell due October 1st, 1873, to April 1st, 1875, inclusive, and received therefor convertible bonds, at seventy-five cents on the dollar, and scrip certificates of fractional sums less than five hundred ($500) dollars, and that the holders of forty-two thousand five hundred dollars ($42,500) of said Indiana bonds placed in the hands of said Fosdick, as trustee, the coupons thereof which fell due October 1st, 1873, to April 1st, 1875, inclusive, and received therefor convertible bonds, at seventy-five cents on the dollar, and scrip certificates for fractional sums less than five hundred dollars ($500), and that the total amount of convertible bonds issued for the coupons from the Illinois bonds and the Indiana bonds was the sum of fifty-six thousand dollars ($56,000), and of scrip certifi-

cates the sum of three thousand four hundred and seventy-nine dollars and ninety-three cents ($3,479.93);

And it further appearing to the court that thereafter and on or about the 20th of November, 1873, the said railroad company issued to its said bondholders another circular, which proposed the following scheme: That the bondholders should deposit the four coupons, from October 1st, 1873, to April 1st, 1875, inclusive, with complainant, William R. Fosdick, as trustee, and should receive in exchange therefor certificates of indebtedness, payable in five (5) years from February 1st, 1874, with interest payable semi-annually, on the first days of February and August of each year, principal and interest payable in gold, the
131 coupons to be held by the trustee until after the maturity of the certificates of indebtedness on the 1st of February, 1879, when they were to be canceled by said trustee and surrendered to the company; but in case of the non-payment of the interest or the principal of the certificates at maturity, or of the coupons on the first-mortgage bonds between October 1st, 1875, and February 1st, 1879, both inclusive, then the coupons were to be returned to the original owners, upon surrender of the certificates, with all their original rights to proceed against the company unimpaired;

And it further appearing to the court that the holders of one million five hundred and thirty thousand dollars ($1,530,000) of the said Illinois bonds placed in the hands of the said Fosdick, as trustee, the four coupons therefrom, mentioned in said circular, and received therefor certificates of indebtedness of said company of the form, tenor, and effect described in said circular, aggregating in amount the sum of two hundred and fourteen thousand two hundred and ten dollars ($214,210), and that the holders of nine hundred and fifty-seven thousand five hundred dollars ($957,500) of said Indiana bonds placed in the hands of said Fosdick, as trustee, the four coupons thereof mentioned in said circular, and received therefor certificates of indebtedness of said company to the aggregate amount of one hundred and thirty-four thousand and fifty dollars ($134,050);

And it further appearing to the court that all of the said coupons still remain in the hands of said Fosdick as trustee as aforesaid;

And it further appearing to the court that the semi-annual interest which fell due August 1st, 1874, upon the said convertible bonds and scrip certificates, and certificates of indebtedness so issued as aforesaid, was paid by the said company, and that the semi-annual interest which fell due on the 1st day of February, 1875, on the said convertible bonds, scrip certificates, and certificates of indebtedness, was duly paid by said company upon all of the same which were presented for payment, which was the great bulk thereof, and that no interest has been paid on the same or any part thereof since that time;

And it further appearing to the court that the amount of interest paid as aforesaid, August 1st, 1874, upon the said coupons so funded as aforesaid, for which scrip certificates or certificates of indebtedness had been issued as aforesaid, was the sum of one dollar and twenty-two and one-half cents ($1.22½) in gold upon each coupon, and that the same amount per coupon was paid upon all of the scrip certificates and certificates of indebtedness presented for payment February 1st, 1875, and thereafter, and that each of said coupons so funded as aforesaid, for which the said convertible bonds were received at seventy-five cents on the dollar as aforesaid, and upon which said semi-annual interest was paid as aforesaid, August 1st, 1874, received a payment of one dollar and sixty-three and one-third cents ($1.63⅓) in gold per coupon, and

that the same amount per coupon was paid on all of said convertible bonds issued in lieu of funded coupons, which were presented for payment February 1st, 1875, and thereafter;

132 And it further appearing to the court that of the said twenty-five hundred Illinois bonds there is outstanding the sum of six hundred and ninety-eight thousand five hundred dollars ($698,500) thereof, from which the said four coupons falling due October 1st, 1873, to April 1st, 1875, inclusive, have never been funded under either of the schemes aforesaid, and upon which coupons no payments whatever have been made since the payment of the coupon due April 1st, 1873, and that of the said fifteen hundred Indiana bonds there is outstanding the sum of five hundred thousand dollars ($500,000), from which the said four coupons falling due October 1st, 1873, to April 1st, 1875, inclusive, have never been funded under either of the schemes aforesaid, and upon which no payments whatever have been made since the payment of the coupon which fell due April 1st, 1873;

And it further appearing to the court that in and by the said trust-deeds, and each of them, it was and is, among other things, provided that if default should be made by the said railroad company in the payment of any half-year's interest on any of said bonds in said several trust-deeds described, and the warrant or coupon for such interest shall have been presented, and its payment demanded, and such default shall have continued six months after such demand, without the consent of the holder of such coupon or bond, then and thereupon the principal of all of the said bonds by said trust-deeds severally secured should be and become immediately due and payable, anything in such bonds to the contrary notwithstanding; and the said trustees might so declare the same, and notify the said railroad company thereof, and upon the written request of the holders of a majority of the said bonds then outstanding, should proceed to collect both principal and interest of all such bonds outstanding, by foreclosure and sale of said property or otherwise;

And it further appearing to the court that heretofore, and on the 26th day of February, A. D. 1875, the said complainants, as trustees under the said mortgage or trust-deed to them, dated March 10th, 1869, did declare the principal of the said twenty-five hundred Illinois division bonds to be due and payable by reason of the default of said railroad company in the payment of certain of the coupons of said bonds which fell due October 1st, 1873, payment of which had been duly demanded, and the continuance of such default for more than six months after such demand;

And it further appearing to the court that in and by said trust-deeds, and each of them, it was and is, among other things, provided that in case of sale of the property, railroad, and franchises, in said trust deeds severally described, the purchase-money should be applied as follows:

After deducting from the proceeds of such sale the expenses of the sale and conveyance, and all advances or liabilities which may have been made or incurred by the said trustees in operating and con-

133 trolling and maintaining the said railroad and property, and in managing its business and affairs while in possession, and all payments for taxes, charges, and assessments on said premises, or any part thereof, as well as reasonable compensation for their own services, to apply the proceeds of such sale to the payment of the interest of said two millions and five hundred thousand dollars of bonds, or so many of them as shall have been issued by said party of the first part, and be then outstanding, pro rata, until all such interest shall be paid, and afterwards to apply the remainder to the payment of the principal of said

bonds, pro rata, until such principal shall be paid; and if any surplus remain after paying all of said matters, to pay such surplus to the party of the first part;

And it further appearing to the court that upon the bill filed in this cause, and in pursuance of the prayer therein of the said complainants as trustees, a receiver has been heretofore appointed by this court, and that all of the property, railroad, and franchises within the State of Illinois, and in the said several mortgages or trust-deeds described, has been taken possession of by such receiver, under the order of this court, and has been since that time managed, controlled, operated, and held possession of by him under the orders of this court;

And it further appearing to the court that there is now due and owing by the said defendant, the Chicago, Danville and Vincennes Railroad Company, to the said complainants, as trustees in the said Illinois division mortgage-deed:

First. The sum of eighty-seven thousand five hundred dollars ($87,500), in gold coin, for the coupons of the said twenty-five hundred (2,500) Illinois division bonds, which fell due on the 1st day of October, A. D. 1873, with interest thereon from and after the said last-mentioned day at the rate of six (6) per cent. per annum, in gold, less such sums as have heretofore been paid upon certain of said coupons under the funding arrangements hereinbefore set forth;

Second. In the further sum of eighty-seven thousand five hundred dollars ($87,500), in gold coin, for the coupons of the said Illinois division bonds, which fell due on the 1st day of April, A. D. 1874, with interest thereon from and after the said last-mentioned day at six per cent. per annum, in gold, less such sums as have heretofore been paid upon certain of said coupons under the funding arrangements hereinbefore stated;

Third. In the further sum of eighty-seven thousand five hundred dollars ($87,500), in gold coin, for the coupons of the said Illinois division bonds, which fell due on the 1st day of October, A. D. 1874, with interest from and after said last-mentioned day at six per cent. per annum, in gold, less such sums as have heretofore been paid upon certain of said coupons under said funding schemes;

Fourth. In the further sum of eighty-seven thousand five hundred dollars ($87,500), in gold coin, for the coupons of the said Illinois division bonds, which fell due on the 1st day of April, A. D. 1875,
134 with interest from and after the said last-mentioned day at six per cent. per annum, in gold, less such sums as have heretofore been paid upon certain of said coupons under said funding schemes;

Fifth. In the further sum of eighty-seven thousand five hundred dollars ($87,500), in gold coin, for the coupons of the said Illinois division bonds, which fell due on the 1st day of October, A. D. 1875, with interest thereon from and after said last-mentioned day at the rate of six per cent. per annum, in gold;

Sixth. In the further sum of eighty-seven thousand five hundred dollars ($87,500), in gold coin, for the coupons of the said Illinois division bonds, which fell due on the 1st day of April, A. D. 1876, with interest thereon from and after said last-mentioned days at the rate of six (6) per cent. per annum, in gold;

Seventh. In the further sum of eighty-seven thousand five hundred dollars ($87,500), for the coupons of the Illinois division bonds, which fell due on the 1st day of October, A. D. 1876, with interest thereon from and after said last-mentioned day, at the rate of six (6) per cent. per annum, in gold;

Eighth. And in the further sum of two million five hundred thousand

dollars ($2,500,000), in gold coin, for the principal of the said Illinois division bonds, so declared to be due as aforesaid, together with interest thereon from and after the first day of October, A. D. 1876, at the rate of seven (7) per cent. per annum, in gold;

And that the said several sums of money, with the interest thereon, are due and owing in the order in which they are hereinbefore stated and set forth:

Now, therefore, it is hereby ordered, adjudged, and decreed that the said defendant, the Chicago, Danville & Vincennes Railroad Company, pay, or cause to be paid, to the said complainants, as trustees for the holders of the said Illinois division bonds and coupons, the said several sums of money, with interest thereon, as hereinbefore found to be due and owing, within twenty (20) days from and after the entry of this decree, and in default thereof, that all of the said railroad, premises, property, and franchises, described in the said trust-deed, dated March 10th, A. D. 1869, and hereinbefore described as the Illinois division of said railroad, together with all the rights, franchises, property, and appurtenances thereof, and the rolling-stock thereto belonging, and herein particularly scheduled and set forth, and all the contract-rights of said company for the use of tracks of other railroads between Thornton and Chicago, and all other rights, privileges, and appurtenances of the said Illinois division of said railroad, as the same is hereinafter specifically scheduled, and all the right, title, interest, and equity of redemption of the said Chicago, Danville & Vincennes Railroad Company therein, shall be sold as an entirety by Henry W. Bishop, the master in chancery of this court, at public auction, to the highest and best bidder for cash therefor, payable as hereinafter provided, at the west door of the Republic Life-Insurance Company building, in the city of Chicago, in the State of Illinois, after having first given notice of the time and place, and terms of sale, and a description of the property to be sold by
135 advertisement thereof in some public newspaper published in the city of Chicago, for the space of thirty (30) days prior to such day of sale.

The terms of such sale shall be as follows:

Twenty-five (25) per cent. of the purchase-money to be paid to said master in chancery in cash, at the time of sale. One-half of the balance of the purchase-money to be paid to said master, in cash, within three months from the day of sale, and the remainder to be paid to said master, in cash, within six months from said day of sale.

And it is further ordered, adjudged, and decreed that the said master make report of said sale to this court, and that upon confirmation thereof, and the full payment of the whole of the purchase-money, that the said Bishop, as master in chancery of this court, shall convey to the purchaser or purchasers, at such sale, all of the said railroad, premises, property, appurtenances, and franchises sold, by a good and sufficient deed therefor, which said deed, when so made and delivered, shall vest in the grantee all the right, title, estate, interest, property and equity of redemption of the said railroad company, of, in, and to the said railroad, property, premises, appurtenances, and franchises, in fee-simple forever, and shall entitle said grantee to the possession thereof, and shall be a perpetual bar, both in law and equity, against any and every claim of the said railroad company, and its successors or assigns, and against all and every person or corporation claiming or to claim the said railroad, premises, property, appurtenances, and franchises, or any part thereof, under or through the said railroad company, forever.

And it is further ordered, adjudged, and decreed that the receiver

heretofore appointed in said cause, and now in possession of the said railroad, property, premises, appurtenances, and franchises, shall, upon presentation to him of the said deed, deliver to the grantee or grantees therein named all the railroad, property, premises, appurtenances, and franchises therein described.

And it is further ordered, adjudged, and decreed that in case the purchaser or purchasers at such sale shall fail to make prompt payment of the whole of said purchase-money, according to the terms and conditions of said sale, as hereinbefore specified, the said master shall report the same to the court, and thereupon the said sale shall be null and void, and the said purchaser shall of the said purchase-money forfeit an amount equal to the sums of money disbursed by said master out of said purchase-money, under the provisions of this decree, not including the amount paid over to the clerk of this court under the provisions of this decree.

And it is further ordered, adjudged, and decreed that the said master shall, out of the proceeds of such sale,

First. Pay all the costs of this suit, and the costs and expenses of such sale, including the fees of said master;

136 Second. Pay all expenses and compensation of the said complainants, as trustees of the said bond and coupon holders, including attorneys' fees incurred in the course of their trust, and in the prosecution or defense of any and all suits brought by or against them, as trustees, which shall be allowed by or under the order of this court, and also all other costs and attorneys' fees which shall be allowed by or under the order of this court, in favor of the parties to this suit, or intervening petitioners therein;

Third. Pay the balance to the clerk of this court.

And it is further ordered, adjudged, and decreed that the said William R. Fosdick, on or before the confirmation of said sale, deliver to the clerk of this court all of the said Illinois division coupons deposited with him as trustee as aforesaid, for which either convertible bonds, scrip certificates, or certificates of indebtedness have been issued under the funding schemes hereinbefore set forth, with a full statement of the names of the depositors of the said several coupons, and the new obligations of said company issued therefor, so far as the same is within the knowledge of said Fosdick; and that the clerk of said court shall, upon receipt thereof, deliver to said Fosdick a certified copy of this decree, with an endorsement thereon, stating the receipt of said coupons by him, and the said Fosdick shall be thereupon released from any further duty or liability as trustee of said coupons.

And it is further ordered, adjudged, and decreed that the said clerk, out of the moneys so paid to him by said master, as aforesaid, shall,

First. Pay all the liabilities of the Illinois division of said railroad incurred by the receiver in this cause by or under the order of this court, including the compensation of said receiver, and all claims against said railroad company which said receiver has been or shall be required to pay by order of this court, which shall remain unpaid after the application thereto of all moneys in the hands of said receiver at the time of the confirmation of the sale hereinbefore provided for;

Second. Out of the surplus, said clerk shall pay in gold, pro rata, the coupons of said Illinois division bonds which fell due October 1st, 1873, with interest from that date to the day of sale, at the rate of six per cent. per annum, after having first applied on all the funded coupons the moneys received thereon, severally, under said funding schemes, as of the date when such payments were made;

Third. Said clerk shall, out of the surplus, if any, pay in gold, pro rata, the coupons of said Illinois division bonds which fell due April 1st, 1874, with interest from that date to the day of sale, at the rate of six per cent. per annum, after having first applied on all the funded coupons the moneys received thereon, severally, under said funding schemes, as of the date when such payments were made;

Fourth. Out of the surplus, if any, said clerk shall pay in gold, pro rata, the coupons of said Illinois division bonds which fell due
137 October 1st, 1874, with interest from that date to the day of sale, at the rate of six per cent. per annum, after having first applied on all of the funded coupons the moneys received thereon, severally, under said funding schemes, as of the date when such payments were made;

Fifth. Out of the remaining surplus, if any, the said clerk shall pay in gold, pro rata, the coupons of said Illinois division bonds which fell due April 1st, 1875, with interest from that date to the day of sale, at the rate of six per cent. per annum, after having first applied on all the funded coupons the moneys received thereon, severally, under said funding schemes, as of the date when such payments were made;

Sixth. Out of the remaining surplus, if any, said clerk shall pay in gold, pro rata, the coupons of said Illinois division bonds which fell due October 1st, 1875, with interest from that date to the day of sale, at the rate of six per cent. per annum;

Seventh. Out of the remaining surplus, if any, the said clerk shall pay in gold, pro rata, the coupons of said Illinois division bonds which fell due April 1st, 1876, with interest from that date to the day of sale, at the rate of six per cent. per annum;

Eighth. Out of the remaining surplus, if any, the said clerk shall pay in gold, pro rata, the coupons of the said Illinois division bonds which fell due October 1st, A. D. 1876, with interest from that date to the day of sale, at the rate of six per cent. per annum;

Ninth. Out of the remaining surplus, if any, the said clerk shall pay in gold, pro rata, all of the said Illinois division bonds, with interest from the said first day of October, A. D. 1876, to the day of sale, at the rate of seven per cent. per annum.

Tenth. If any surplus shall remain after deducting from the amount paid by said master to said clerk the aggregate of all the payments hereinbefore directed to be made by said clerk, the said clerk shall report the same to the court for further order in this behalf.

Schedule of premises and property to be sold by Henry W. Bishop, as master in chancery, as hereinbefore provided.

1. The main line of the Chicago, Danville and Vincennes Railroad, from Dalton, in the county of Cook, southerly to Danville, in the county of Vermillion, a distance of one hundred and eight (108) miles; and a branch line from Bismarck, in said Vermillion County, southeasterly to the east line of the State of Illinois, a distance of four and six-tenths ($4\frac{6}{10}$) miles, together with the right of way, station and other grounds, grading, bridges, culverts, tracks, shops, including fixtures and tools, stations, and other buildings and structures, fences, and appurtenances thereof, and all wood, coal, and other supplies for the use and operation thereof.

138 2. The contract rights of the said Chicago, Danville and Vincennes Railroad Company to the use of the tracks and appurtenances of the Chicago and Southern Railroad Company, and the tracks and appurtenances of the Pittsburgh, Cincinnati and St Louis Railway Company from Thornton, in Cook County, to and into the city of Chicago.

3. The terminal tracks, sidings, switches, and appurtenances of said Chicago, Danville and Vincennes Railroad Company at and near said city of Chicago, whether the same are situate on the grounds and rights of way of said company or otherwise, aggregating a length of seven and eight-tenths ($7\frac{8}{10}$) miles, together with all rights of way or contracts therefor, or rights to have and maintain such tracks, or any part thereof, and all buildings, structures, erections and appurtenances thereof, including a water-tank, and an undivided interest in an engine-house of fourteen (14) stalls situate on grounds of the said Chicago and Southern Railroad Company, adjacent to the city of Chicago, and all wood, coal, and other supplies, tools and fixtures, for the use of said Chicago, Danville and Vincennes Railroad Company, and situate or used within said city of Chicago, or along the line of said Chicago and Southern Railroad Company, or said Pittsburgh, Cincinnati and S't Louis Railway Company, north of said Thornton.

4. The south eighteen (18) feet of lot twelve (12), and lots thirteen (13) and sixteen (16) in block thirteen (13), and lot six (6) in block nine (9), Carpenter's addition to Chicago; also lot twenty-four (24) in block seven (7), Carpenter's addition to Chicago, subject to a lien of about twenty-five hundred (2,500) dollars.

Lots twenty-nine (29), thirty (30), and thirty-two (32), and a leasehold interest in lot thirty-one (31), all in block four (4), Magie & High's addition to Chicago, with the tracks and buildings and fixtures thereon; said lots twenty-nine (29), thirty (30), and thirty-two (32) being subject to a first lien of about twenty-three hundred dollars ($2,300).

5. Twenty-five (25) locomotives, numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 21, 22, 24, 30, 31, 32, 33, and 34.

Six (6) passenger-cars, numbered 3, 4, 5, 6, 7, and 8.

Three (3) baggage-cars, numbered 2, 3, and 4.

Three (3) mail-cars, numbered 1, 3, and 4.

Eight (8) caboose cars, numbered 3, 4, 5, 6, 7, 8, 9, 10.

One hundred and sixty-one (161) box-cars, being those bearing numbers between 564 to 615 both inclusive, and 1001 to 1115, both inclusive.

Eighty-five (85) box-cars (Adams), being those bearing numbers between 1136 to 1220, both inclusive.

Three hundred and eighteen (318) coal-cars, being those bearing numbers between 1 to 100, both inclusive, and 145 to 376, both inclusive.

One hundred and eighteen (118) block coal-cars, being those bearing numbers between 01 to 0118, both inclusive.

139 Thirty-four (34) stock-cars, being those bearing numbers between 501 to 534, both inclusive.

6. All of the franchises of the said Chicago, Danville and Vincennes Railroad Company within the State of Illinois, and all of the property and premises within said State other than that in this schedule specifically described in which the said railroad company has any interest, held by it for use in the maintenance and operation of the said line of railroad.

And the defendants, The Chicago, Danville and Vincennes Railroad Company and James W. Elwell, and each for itself and himself, separately pray an appeal from the whole of said decree to the Supreme Court of the United States, which the court doth grant upon the filing of a bond, within sixty days from the entry hereof, in the sum of fifteen hundred dollars, with surety to be approved by the court.

And it is further ordered that upon said defendants filing of a bond, with sureties to be approved by the court as aforesaid, in the penal sum

of five hundred thousand dollars, that the filing of said bond shall operate as a supersedeas, and all further proceedings under said decree be stayed, as by the law in such cases provided.

Entered December 5th, 1876.

140 Afterwards, to wit, on the 16th day of April, A. D. 1877, in the record of the proceedings of said court in said entitled cause, before the Hon. Thomas Drummond, judge, is the following entry, to wit:

WILLIAM R. FOSDICK AND JAMES D. FISH *vs.* THE CHICAGO, DANVILLE AND VINCENNES Railroad Company et al. } In chancery.

The report of Henry W. Bishop, esq., master in chancery, having been filed, reporting the surrender to him of two thousand three hundred and twenty-eight (2,328) bonds, and the coupons and certificates in said report mentioned, and the form and execution by him of a deed to Frederic W. Huidekoper, Thomas W. Shannon, and John M. Denison, in pursuance of a decree entered in this cause on December fifth, A. D. 1876, and the further order or decree of this court entered herein on the twelfth day of April, A. D. 1877, and the said report having been examined and also said deed presented therewith, the said report and deed are hereby confirmed and approved, together with the reception by said master of the bonds, coupons, and certificates in said report mentioned, also approved and confirmed.

And the said deed is ordered to be entered of record, and is as follows, to wit:

141 This indenture, made the twelfth day of April, in the year of our Lord one thousand eight hundred and seventy-seven, between Henry W. Bishop, as master in chancery of the circuit court of the United States for the northern district of Illinois, party of the first part, and Frederic W. Huidekoper, Thomas W. Shannon, and John M. Denison, parties of the second part, witnesseth:

That whereas, by a decree duly entered of record on the fifth day of December, A. D. 1876, it was ordered, adjudged, and decreed by the circuit court of the United States for the northern district of Illinois, in a certain action therein pending, wherein William R. Fosdick and James D. Fish were complainants and the Chicago, Danville and Vincennes Railroad Company and others were defendants, that the Chicago, Danville and Vincennes Railroad Company should, within twenty days thereafter, pay or cause to be paid to William R. Fosdick and James D. Fish, as trustees for first-mortgage bondholders, the certain sums of money which by said decree were adjudged to be due to such trustees, under a certain mortgage or deed of trust made, executed, and delivered by said company on the 10th day of March, A. D. 1869, and on the bonds issued thereunder; and it was further decreed that all of the said railroad property, premises, and franchises described in said mortgage or deed of trust, together with all the rights, franchises, property, and appurtenances thereof, and the rolling-stock thereto belonging, and hereinafter particularly scheduled and set forth, and all the right, title, interest, and equity of redemption of said Chicago, Danville and Vincennes Railroad Company, should be sold as an entirety by Henry W. Bishop, the master in chancery of said circuit court of the United States, at public auction, to the highest and best bidder therefor, on the terms

142 specified in said decree, at the west door of the Republic Life-

Insurance Company building, in the city of Chicago, in the State of Illinois, after having first given notice of the time and place and terms of sale, and a description of the property to be sold, by advertisement thereof in some public newspaper published in the city of Chicago, for the space of thirty days prior to such day of sale;

And whereas the said Chicago, Danville and Vincennes Railroad Company failed to pay the said sum of money adjudged by said decree as aforesaid to be due within the time ordered, and thereupon the said master in chancery, after having given due notice of the time, place, and terms of sale, and a description of the property to be sold, in accordance with the directions of the said decree, did, on the seventh day of February, A. D. 1877, offer for sale at public auction the said property, in pursuance of said notice, and thereupon Frederic W. Huidekoper, Thomas W. Shannon, and John M. Denison became the highest bidders therefor, at the sum of one million four hundred and fifty thousand dollars in gold, and were thereupon declared the purchasers thereof by said master; and the sale and bid having been reported by said master in chancery to the said court, and the said sale having been in all things confirmed by the said court, and the purchasers having fully complied with the terms of such decree, and the further decree of said court, dated April 12th, A. D. 1877, as to payments, and the said master having been ordered by the said further decree of said court to execute and deliver to such purchasers a conveyance of said property so sold and purchased by them as aforesaid:

Now, therefore, this indenture witnesseth that the said Henry W. Bishop, master in chancery of the circuit court of the United States for the northern district of Illinois, party of the first part, in order to carry into effect the said sale, so made as aforesaid, and in execution of the orders and decrees of said court requiring him to execute and deliver such conveyance, and in consideration of the premises and of the
143 payments made by the said parties of the second part, in accordance with the orders of the court, has sold, and by these presents does sell and convey, unto the said Frederic W. Huidekoper, Thomas W. Shannon, and John M. Denison, parties of the second part, all and singular—

The main line of the Chicago, Danville and Vincennes Railroad from Dalton, in the county of Cook, southerly to Danville, in the county of Vermillion, a distance of one hundred and eight (108) miles; and a branch line from Bismarck, in said Vermillion County, southeasterly to the east line of the State of Illinois, a distance of four and six-tenths (4⅗) miles, together with the right of way, station and other grounds, grading, bridges, culverts, tracks, shops, including fixtures and tools, stations and other buildings and structures, fences, and appurtenances thereof, and all wood, coal, and other supplies for the use and operation thereof.

The contract rights of the said Chicago, Danville and Vincennes Railroad Company to the use of the tracks and appurtenances of the Chicago and Southern Railroad Company, and the tracks and appurtenances of the Pittsburgh, Cincinnati and St Louis Railway Company from Thornton, in Cook County, to and into the city of Chicago.

The terminal tracks, sidings, switches, and appurtenances of said Chicago, Danville and Vincennes Railroad Company at and near said city of Chicago, whether the same are situate on the grounds and rights of way of said company or otherwise, aggregating a length of seven and eight-tenths (7⅘) miles, together with all rights of way or contracts therefor, or rights to have and maintain such tracks, or any part thereof, and all buildings, structures, erections, and appurtenances thereof, including

a water-tank, and an undivided interest in an engine-house of fourteen (14) stalls situate on grounds of the said Chicago and Southern Railroad Company, adjacent to the city of Chicago, and all wood, coal, and other supplies, tools and fixtures, for the use of said Chicago, Danville
141 and Vincennes Railroad Company, and situate or used within said city of Chicago, or along the line of said Chicago and Southern Railroad Company, or said Pittsburgh, Cincinnati and S't Louis Railway Company, north of said Thornton.

The south eighteen (18) feet of lot twelve (12), and lots thirteen (13) and sixteen (16) in block thirteen (13), and lot six (6) in block nine (9), Carpenter's addition to Chicago; also lot twenty-four (24) in block seven (7), Carpenter's addition to Chicago, subject to a lien of about twenty-five hundred (2,500) dollars.

Lots twenty-nine (29), thirty (30), and thirty-two (32), and a leasehold interest in lot thirty-one (31), all in block four (4), Magie & High's addition to Chicago, with the tracks and buildings and fixtures thereon; said lots twenty-nine (29), thirty (30), and thirty-two (32) being subject to a first lien of about twenty-three hundred dollars ($2,300).

Twenty-five (25) locomotives, numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 21, 22, 24, 30, 31, 32, 33, and 34.

Six (6) passenger-cars, numbered 3, 4, 5, 6, 7, and 8.

Three (3) baggage-cars, numbered 2, 3, and 4.

Three (3) mail-cars, numbered 1, 3, and 4.

Eight (8) caboose-cars, numbered 3, 4, 5, 6, 7, 8, 9, and 10.

One hundred and sixty-one (161) box-cars, being those bearing numbers between 564 to 615, both inclusive, and 1001 to 1115, both inclusive.

Eighty-five (85) box-cars (Adams'), being those bearing numbers between 1136 to 1220, both inclusive.

Three hundred and eighteen (318) coal-cars, being those bearing numbers between 1 to 100, both inclusive, and 145 to 376, both inclusive.

One hundred and eighteen (118) block-coal cars, being those bearing numbers between 01 to 0118, both inclusive.

Thirty-four (34) stock-cars, being those bearing numbers between 501 to 534, both inclusive.

All of the franchises of the said Chicago, Danville and Vin-
145 cennes Railroad Company within the State of Illinois, and all of the property and premises within said State other than that in this schedule specifically described, in which the said railroad company has any interest, held by it for use in the maintenance and operation of the said line of railroad.

To have and to hold the said property with the appurtenances, rights, and franchises, and each and every part thereof, so sold and hereinbefore described, unto the said Frederic W. Huidekoper, Thomas W. Shannon, and John M. Denison, their heirs and assigns. Meaning and intending hereby to convey to the said parties of the second part the above-described premises and franchises as fully and completely as the said party of the first part, the said master in chancery, by virtue of the said several decrees and orders of said circuit court, reference being hereby had thereto, can or could sell and convey the said premises, property, and franchises, subject to all taxes.

In witness whereof the said Henry W. Bishop, as master in chancery aforesaid, has hereunto set his hand and seal the day and year first above written.

HENRY W. BISHOP, [SEAL.]
Master in Chancery of the Circuit Court of the United States for the Northern District of Illinois.

146 STATE OF ILLINOIS,
Cook County, ss:

I, Edmund Gorvett, a notary public in and for said county, in the State aforesaid, do hereby certify that Henry W. Bishop, who is personally known to me to be the same person whose name is subscribed to the annexed deed of conveyance, appeared before me this day, in person, and acknowledged that he, as master in chancery of the circuit court of the United States for the northern district of Illinois, had signed, sealed, and delivered the said instrument of writing, as his free act and deed for the uses and purposes therein expressed.

Given under my hand and notarial seal this twelfth day of April, A. D. 1877.

[SEAL.] EDMUND GORVETT,
Notary Public.

147 Afterwards, to wit, on the 28th day of April, A. D. 1877, Henry W. Bishop, the master in chancery, to whom said petition was referred, filed in said clerk's office his report in said-entitled cause, which said report is in the words and figures following, to wit:

Master's report.

In the circuit court of the United States for the northern district of Illinois.

WILLIAM R. FOSDICK AND JAMES D. FISH, complainants,
vs.
THE CHICAGO, DANVILLE AND VINCENNES Railroad Company, defendant. } In chancery.

In the matter of the intervening petition of Michael Schall.

I, Henry W. Bishop, to whom, by an order of the court entered herein, the above petition was referred for examination and report, respectfully report that, having given notice to the parties interested that a hearing would be had before me, for the purposes in said order expressed, on Tuesday, the 27th day of June, A. D. 1876, I was on that day attended by R. Biddle Roberts, counsel for the intervening petitioner,
148 and Mr. Crawford, of counsel for certain of the bondholders, and by Gen. Adna Anderson, a witness on behalf of the intervening petitioner, from whose examination and testimony I find that in February, A. D. 1873, a contract was entered into between the petitioner and J. E. Young, then general manager of the railroad, by the terms of which the petitioner was to furnish said railroad company two hundred and twenty-five (225) coal-cars, for which the road agreed to pay in gross the sum of one hundred and fifty-four thousand six hundred and fifty-nine dollars and forty-five cents ($154,659.45) in the manner indicated in said contract, a copy of which is herewith attached and made a part of this report.

That up to the time of the appointment of Gen. Anderson as receiver the sum of forty-four thousand three hundred and twenty-three dollars and forty-three cents ($44,323.43) had been paid, which payment was made, twenty-eight thousand eight hundred and eighty-three dollars and eighteen cents ($28,883.18) in cash and fifteen thousand four hundred and forty dollars and twenty-five cents ($15,440.25) in bonds,

leaving unpaid the sum of one hundred and ten thousand three
149 hundred and thirty-six dollars and four cents ($110,336.04), the company having executed their notes for the full amount of said contract, and the petitioner now holds all of said notes with the exception of those that were taken up by the payments above stated.

Upon the appointment of Gen. Anderson as receiver the cars were in use upon the road, and a special arrangement was made between him and the petitioner by which they were to remain upon the road during the time he held the road as receiver by his paying a rental for them, and also a conditional arrangement by which they could be purchased; and they are now held by said receiver in the same way.

I find further that said cars are necessary for the business of the road, and that the contract hereinafter set forth made by the receiver with the petitioner is a beneficial one to the road whether it remains in the hands of the receiver or passes into the possession of other parties. The arrangement referred to provided for the payment of seven dollars ($7) a month rent for the cars, estimating their value at four hundred
150 and twenty dollars ($420) each; and further provided that on payment of interest at the rate of seven per cent. on the different payments at the end of five years the cars should become the property of the railroad. The testimony of Gen. Anderson shows that this contract is a beneficial one to the road; and, upon his suggestion, subject to the approval of the court—

I, therefore, recommend that an order be entered allowing him to consummate the same upon the terms indicated, upon the petitioner's surrendering to him the notes executed by the company for the original purchase-money.

All of which is respectfully submitted.

H. W. BISHOP,
Master, &c.

In the circuit court of the United States for the northern district of Illinois.

WILLIAM R. FOSDICK AND JAMES D. FISH, complainants, *vs.* CHICAGO, DANVILLE AND VINCENNES RAILROAD COMPANY, defendant. } In chancery.

On intervening petition of Michael Schall.

151 *Testimony taken before Henry W. Bishop, master in chancery of said court.*

TUESDAY, *the 27th day of June, A. D.* 1876.

Present, R. Biddle Roberts, esq., of counsel for certain bondholders, and the witness below named.

ADNA ANDERSON, a witness on behalf of the intervening petitioner, being first duly sworn, was examined in chief by M'r Roberts, and deposes and says as follows:

Q. State whether you are the receiver of the Chicago, Danville and Vincennes Road, and how long have you been so?

A. I am the receiver, and have been since the 1st of June, 1875.

Q. State, if you please, whether you made an examination of the affairs of that road, and in your report you stated a claim of Michael

Schall upon the company. Please give a detailed statement of particulars in regard to it.

A. I found the claim of Michael Schall a year ago, when I was appointed receiver, for 225 coal-cars that had been furnished the Chicago, Danville and Vincennes Railroad Company, under a contract made in February, 1873. The amount agreed to be paid for the cars was $154,659.47, and there had been paid $44,323.43, leaving unpaid under the contract $110,336.04. How full do you want it stated?

152 Q. I want the particulars—how payments were made, what rental, if any.

A. The company had given its notes for the payment of the full amount—$154,659.47. They had paid $28,883.18 in cash, and $15,440.25 in second mortgage bonds, making a total payment of $44,323.43, as previously stated.

Q. What is the amount due M'r Schall?

A. The amount due on the contract is $110,339.09 of the principal.

Q. To be paid when?

A. A series of notes were given to M'r Schall, and they are all, or nearly all, due. They were payable along at intervals within a month, I believe.

Q. Are the cars still in possession of the road?

A. They are.

Q. Subject to rental?

A. They are. When I took charge of the road I found the cars on the road, and then arranged with M'r Schall to use them during the time that I held the road by paying him a rental, also a conditional arrangement by which they could be purchased.

Q. Are they necessary for the business of the road here?

A. They or some other cars of the same kind are.

153 Q. What arrangement did you make for the purchase of the cars?

A. To answer that question I will have to go back a little. The amount due under the contract for the cars—for each car was $490.37.

By M'r Crawford:

Q. Was that exclusive of interest?

A. Exclusive of interest. After a good deal of talk with M'r Schall, we finally agreed upon this plan, subject to the approval of the court: That we were to pay him seven dollars a month rent for the cars. We were to call the value of the cars $420.00. We were to pay him $7.00 a month for the cars, which would pay him for the cars in just five years, and then we were to add the interest of the different payments at the rate of seven per cent. during that time, which would give the road the cars at the end of five years by simply paying the interest on that amount of money, which amounted to $72.27 in five years.

Q. You made that agreement with M'r Schall subject to the approval of the court?

A. I did. It was a verbal agreement.

Q. Do you recommend that as a good arrangement for the road?

A. I do. I filed a statement of the case in court, and asked

154 for instructions. I may say that the arrangement that I made of an average of $1.20 a month for five years would extinguish M'r Schall's title to the cars.

Cross-examination by M'r Crawford:

Q. Is that contract between M'r Schall and the railroad company in writing?

A. It is not; it is simply verbal.
Q. The original contract?
A. I thought you said the contract between M'r Schall and myself.
Q. No; the question is between him and the railroad company.
A. The contract between M'r Schall and the railroad company is in writing.
Q. Is that among the papers of the company?
A. It is in my office. I don't know whether it is in the papers here.
Q. Will you be kind enough to have some of your clerks make a copy and append it here, so that we will know just what the nature of the contract is?
A. Yes, sir.
Q. Do the company's notes for the $110,000.00 still remain outstanding?
A. They do.
Q. Is that commercial paper?
A. It is.
Q. Do you know *what* M'r Schall has it, or who has obtained it—where it is?
A. He told me that he had put a few thousand dollars out as
155 security, and he proposed to get that up in case this was carried out.
Q. He stated that he was owner of it?
A. He did; it was a condition of that agreement that that paper was to be returned.
Q. All of it?
A. All of it.
Q. The arrangement between you and M'r Schall was made when, general?
A. On the 27th of November, 1875.
Q. Has it still been carried out by you to the extent of paying rental, or any part of it?
A. I have paid the rental of the cars regularly right along, but have not paid anything but rental.
Q. You have paid the rental of the cars from the time you took possession as receiver?
A. I have.
Q. This is the same rental that it was agreed you should pay M'r Schall?
A. Yes, sir.
Q. You have paid it?
A. Yes, sir.
Q. How much have you paid?
A. Seven dollars a month. Now, all that it needs to complete that arrangement is the payment of the average sum of $1.20 per car per month, and it runs up to $2.41 per car per month before it gets through; that is all that is needed.
156 Q. And it also needs payment of seven dollars per month during the entire term of five years?
A. Yes, sir.
Q. And it also needs that all the deferred payments should be made?
A. No, sir.
Q. When was that arrangement described to begin? From the time you were appointed receiver?
A. To begin at any time when we got an order of the court authorizing it.

Q. You had paid thus far simply provisionally as an arrangement between yourself and M'r Schall for the rent of the cars?

A. Yes, sir.

Q. Did you turn the cars over to M'r Schall as soon as you came in possession of the road, or what was done about it?

A. I didn't; the cars are the property of M'r Schall now.

Q. Acting on that theory, you made the arrangement for the payment of rent from the time you took possession as receiver?

A. I did.

Q. What arrangement was made in regard to the time prior to your being appointed as receiver?

A. None.

Q. That was all thrown away?

A. That was set aside.

157 Q. You started just as if there was no previous arrangement or transaction at the date of your appointment?

A. I did.

Q. Your arrangement bases the cars at how much; $420.00 each?

A. $420.00 each.

Q. The cars are coal-cars, are they?

A. They are.

Q. What are new coal-cars worth?

A. About $450.00.

Q. These cars have been in use since 1873?

A. Since the spring of 1873; since February.

Q. Can't you now buy coal-cars for less than $450.00 apiece?

A. Not cars as good as these, I think not.

Q. What is the difference between these cars and new cars; what is the percentage?

A. Well, I think these cars, or cars as good as these, can be bought for $300.00 or $320.00; $320.00, I think.

Q. What was the reason, then, if new cars could be bought for that price, that you bought these?

A. Because I could not pay; the company could not raise the money to pay it.

Q. Then the consideration of payment running five years, and the enhanced price, was somewhere about $100.00?

A. Yes, sir; about that.

Q. This was for old cars?

A. They were not old cars.

158 Q. Two and a half years in use, were they, at the time you made the contract?

A. Yes, sir; they were two and a half years old.

Q. And had been in active service during that time?

A. So far as I know, they had.

Q. You found them among the rolling stock on the road at the time you took possession of it?

A. I did.

Q. Is that part of your rolling-stock mentioned in your report, which you speak of as being out of repair and requiring a large outlay to put in efficient condition?

A. It was mentioned in the report. It was a part of the rolling-stock, in the best repair of any cars on the road—of any cars the road had in its service. The cars had not been in use long enough to be very much out of order. The cars are good cars, and the enhanced price of $100.00 was the amount to be given for the credit of five years.

Q. Besides this $420.00 that you are to pay for the cars, $200.00 per car had already been paid?

A. $197.00.

Q. $197.00 per car had already been paid for them?

A. Yes, sir; it was just about the amount of the rental; that
159 is the way I got at that.

Redirect examination by M'r Roberts:

Q. All the amount of $197.00 that you say you paid was paid upon such an amount as to the value of them as was made in the contract?

A. Yes, sir; it was their estimated value of $687.00.

Q. Which was in accordance with the contract?

A. It was.

(Signature waived).

(Copy.)

NEW YORK, *February 1st*, 1873.

Sold this day, for account of M'r Michael Schall, of York, Penn., to the Chicago, Danville and Vincennes Railroad Co., office No. 38 Pine street, New York—

Two hundred (200) eight-wheel gondola coal-cars, as per specifications and agreements made by M'r J. E. Young and herewith attached.

Price, delivered on the track at Pittsburg at depot of P. C. and S't L. R. R., seven hundred dollars per car. Cars to remain the property of Michael Schall until paid for.

160 Delivery to commence and cars to be taken on or before March 1st, and at least twenty-five (25) cars in each week thereafter, until all are delivered, the seller having the option of increasing the number of cars to be delivered per week, if desired.

Settlement to be made on delivery of each twenty five (25) cars or more, at the option of sellers, with the notes of the Chicago, Danville and Vincennes R. R. Company, payable in the city of New York, and adding interest at the rate of ten per cent. per annum. The first notes are to be drawn at sixty days from date of delivery and for twenty (20) dollars on each car, and the balance for a like amount, and payable monthly thereafter.

Cars to be lettered and numbered as per direction of M'r Young.

Invoice and shipping receipts to be sent to the railroad company's offices No. 38 Pine st., New York.

It is understood the sellers shall not be responsible for the acts of Providence, strikes of workmen, or other causes beyond their control, which may retard and delay the manufacturing and delivery of the said cars as above stated.

161 Shipping receipts to be evidence of delivery.

(Signed) MICHAEL SCHALL.

I hereby accept the above propositions for the R. R. Co.

(Signed) J. E. YOUNG,
Gen. Manager.

(Endorsed:) Filed April 28, 1877. W'm H. Bradley, clerk.

Afterwards, to wit, on the 30th day of April, A. D. 1877, said complainants and intervening bondholders filed in said clerk's office their exceptions to said master's report, which said exceptions are in the words and figures following, to wit:

Exceptions to master's report.

Circuit court of the United States, northern district of Illinois.

WILLIAM R. FOSDICK AND JAMES D. FISH
vs.
THE CHICAGO, DANVILLE AND VINCENNES Railroad Company. } Chancery.

In re the intervening petition of Michael Schall.

The complainants, William R. Fosdick, James D. Fish, and the intervening bondholders, Frederic W. Huidekoper, Thomas W. Shannon, and John M. Denison, and others, except to the master's report
162 in the matter of the said intervening petition, and for cause say:

First. That the said report of the master is not supported by the evidence.

Second. That the master's report and the conclusions thereof are contrary to law.

Third. That it appears from the said evidence and master's report that the title to the property is already in the Chicago, Danville and Vincennes Railroad Company, and that the said petitioner has no title to said property as against these exceptants.

Fourth. That the master erred in reporting in favor of the said petitioner being entitled to said property or to any allowance or compensation therefor upon any ground whatever.

For which reasons these complainants pray that the report may be rejected and the said petition be dismissed.

CRAWFORD AND MCCONNELL,
Sol's for Exceptants.

(Endorsed:) Filed April 30, A. D. 1877. W'm H. Bradley, cl'k.

163 Afterwards, to wit, on the 6th day of October, A. D. 1877, in the record of the proceedings of said court in said entitled cause, before the Hon. Thomas Drummond, judge, is the following entry, to wit:

WILLIAM R. FOSDICK AND JAMES D. FISH
vs.
CHICAGO, DANVILLE AND VINCENNES Railroad Company et al. } In chancery.

In the matter of the intervening petition of Michael Schall.

This day came on to be heard the intervening petition of Michael Schall upon the evidence taken before Henry W. Bishop, esq., master in chancery, Mess'rs Lawrence, Campbell, and Lawrence appearing for complainants, E. Walker, esq., for the defendants, Mess'rs Crawford and McConnell for the purchasers, and R. Biddle Roberts, esq., for said intervening petitioner. And it appearing to the court that on or about the first day of February, A. D. 1873, the said petitioner entered into a contract with the said railroad company, whereby he agreed to furnish said company two hundred and twenty five (225) coal-cars at the rate or
price of seven hundred dollars ($700.00) per car, the said cars to
164 remain the property of the petitioner until paid for, and to be de-

livered in lots of twenty-five cars, and on the delivery of each lot notes of said company were to be given, one due sixty days after date for the amount of twenty dollars ($20.00) on each car, and the others for like amount, payable monthly thereafter:

And it further appearing to the court that the said petitioner has in all respects complied with the terms of said contract on his part, and that the said railroad company is unable to make payment for the said cars according to its agreement:

And it further appearing to the court that said railroad company had the use of said cars for six months prior to the appointment of receivers in this cause, and that petitioner has received no compensation therefor:

And it further appearing that the receivers, Brown and Hammond, heretofore appointed and holding the property of said railroad company, used the said cars in and about the operation of the road during the time they were in possession of the same, for which the petitioner has received no compensation:

165 And it further appearing to the court that the said petitioner ought to receive a fair rental for the use of said cars during the time above stated, and that seven dollars ($7.00) per car per month is a fair and reasonable rental for the same—

The court therefore finds that the said petitioner is entitled to the sum of nine thousand four hundred and fifty dollars ($9,450.00) for the use of said cars from the twenty-second day of August, A. D. 1874, to the twenty-second day of February, A. D. 1875, being for six months prior to the appointment of the receiver herein, and at the rate of seven dollars ($7.00) per car per month, and that the same is a just claim for supplies upon the fund in court in said cause.

The court further finds that said petitioner is entitled to the further sum of five thousand one hundred and eighteen dollars and seventy-five cents ($5,118.75) for rental of said cars from said twenty-second day of February, A. D. 1875, to the thirty-first day of May, A. D. 1875, the time said cars were used by the former receivers, being at the rate of seven dollars ($7.00) per car per month.

And the court further finds that the petitioner is now entitled

166 to the possession of the said cars.

And thereupon, on motion of R. Biddle Roberts, esq., solicitor for said petitioner, it is ordered, adjudged and decreed that the clerk of this court out of the fund now in court in said cause pay to the said petitioner or his solicitor, on receipt of either, the sum of fourteen thousand five hundred sixty-eight dollars and seventy-five cents ($14,568.75) by the court found to be due said petitioner.

And it is further ordered that the purchasers of said road or the receiver, if he has possession thereof, deliver to the said petitioner within sixty days after the entry hereof the cars in said petition described, being two hundred and twenty-five (225) gondola coal-cars manufactured by said petitioner and numbered from 0141 to 0365, both inclusive, and which were marked when delivered to said railroad company, "This car is the property of Michael Schall, York, Pa."

And the complainants herein and the intervening bondholders pray an appeal to the Supreme Court of the United States, which is granted upon any of them entering into a bond in the penal sum of five

167 hundred dollars according to law to be approved by the court.

Afterwards, to wit, on the 8th day of November, A. D. 1877, said complainants and intervening bondholders by their solicitor filed in said clerk's office their bond in appeal in said-entitled cause, which said bond is in the words and figures following, to wit:

Appeal bond.

Know all men by these presents that we are held and firmly bound unto Michael Schall in the penal sum of five hundred dollars lawful money of the United States, for the payment of which said sum well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents, sealed with our seals and dated this eighth (8th) day of November, A. D. 1877.

The condition of the above obligation is such that whereas on the sixth (6th) day of October, A. D. 1877, a decree or decretal order was entered in a cause entitled William R. Fosdick and James D. Fish vs. The Chicago, Dan ville and Vincennes Railroad Company et al., pending in the circuit court of the United States for the northern district of Illinois, decreeing and directing the clerk of said court to pay to
168 the said Michael Schall the sum of fourteen thousand five hundred and sixty-eight $\frac{75}{100}$ dollars out of the fund in court obtained from the sale of the property of the said railroad company under decree of said United States court; and whereas the said William R. Fosdick and James D. Fish, and Frederic W. Huidekoper, Thomas W. Shannon, John M. Denison, George W. Gill, Alanson A. Sumner, Chandler Robbins, and William T. Hickok, bondholders intervening in said cause, have prayed and been allowed an appeal from said decree or decretal order in favor of said Michael Schall to the Supreme Court of the United States:

Now, the condition of this obligation is such that if the said William R. Fosdick and James D. Fish and said Frederic W. Huidekoper, Thomas W. Shannon, John M. Denison, George W. Gill, Alanson A. Sumner, Chandler Robbins, and William T. Hickok or any of them prosecute the said appeal with effect, and perform such judgment and pay all costs awarded against them or any of them by the Supreme Court of the United States, then this obligation to be void; otherwise to remain in full force and effect.

F. W. HUIDEKOPER. [SEAL.]
T. W. SHANNON and [SEAL.]
J. M. DENISON, [SEAL.]
By F. W. HUIDEKOPER.
169 HENRY CRAWFORD. [SEAL.]
ALANSON S. DUNHAM. [SEAL.]

Approved:

THOMAS DRUMMOND.

(Endorsed:) Filed November 8, 1877. Wm. H. Bradley, clerk.

170 NORTHERN DISTRICT OF ILLINOIS, *ss:*

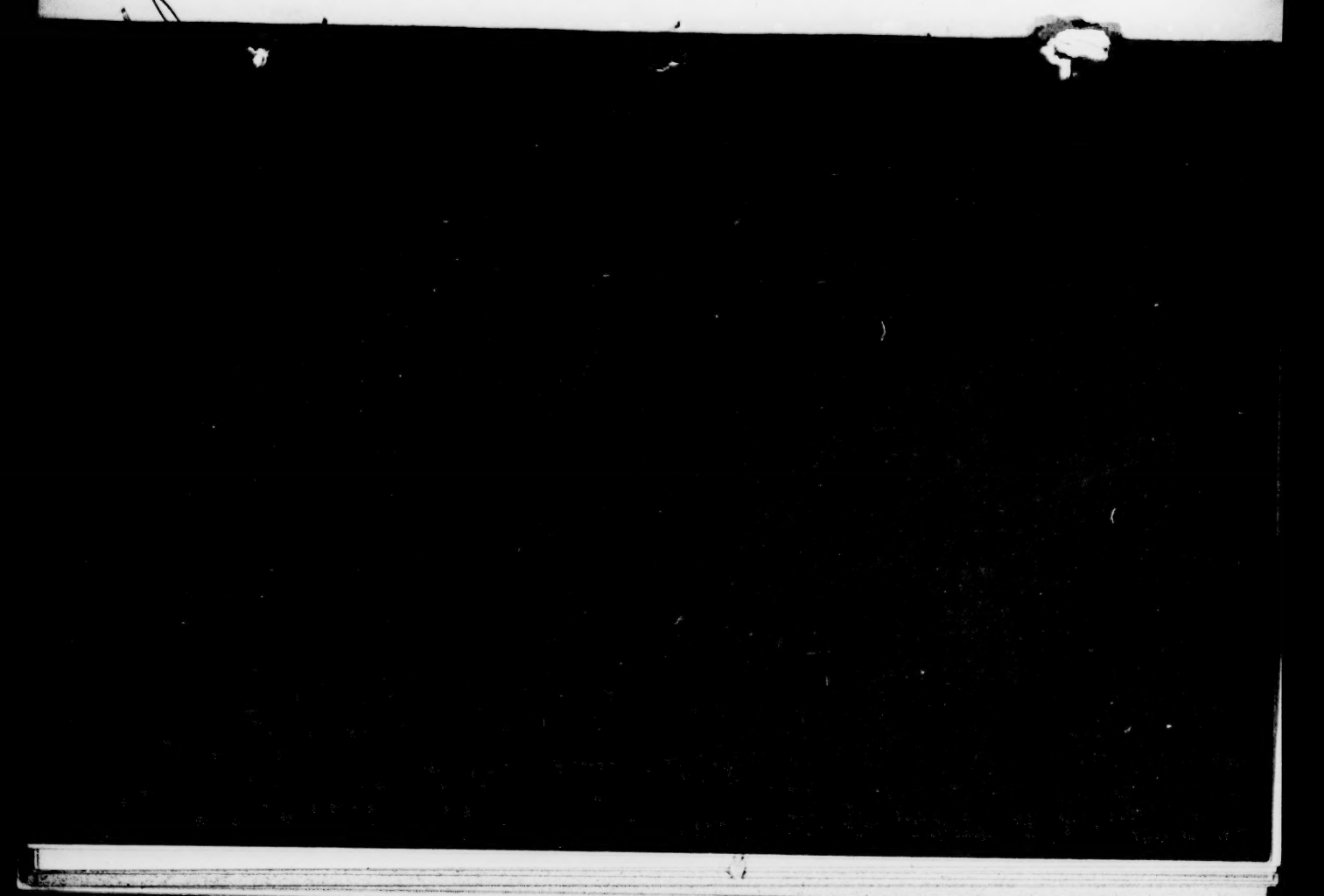
I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein William R. Fosdick et al. are the complainants and The Chicago, Danville and Vincennes Railroad Company et al. are the defendants, in the matter of the intervening petition of Michael Schall, as appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of

said court at my office, in Chicago, in said district, this eighth day of December, A. D. 1877, and of our Independence the 102d year.

[SEAL.] WM. H. BRADLEY,
Clerk.

(Indorsement on cover:) No. 1030. William R. Fosdick & James D. Fish and Frederic W. Huidekoper et al., appellants, vs. Michael Schall, intervenor. N. Illinois, C. C. U. S. Filed 31st December, 1877.



SUPREME COURT of the UNITED STATES,

OCTOBER TERM, A. D. 1877.

WILLIAM R. FOSDICK, AND OTHERS,
vs.
MICHAEL SCHALL,
INTERVENOR.
} Chancery.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF ILLINOIS.

STATEMENT OF CASE, ASSIGNMENT OF ERRORS, AND BRIEF FOR APPELLANTS.

HENRY CRAWFORD,
Solicitor.

CHICAGO:
PRESS OF BEACH, BARNARD & CO., LEGAL PRINTERS, NO. 104 RANDOLPH STREET
1878.

IN THE

United States Supreme Court,

OCTOBER TERM, A. D. 1877.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF ILLINOIS.

WILLIAM R. FOSDICK, AND OTHERS,
APPELLANTS.
vs.
MICHAEL SCHALL,
APPELLEE.
} Chancery.

STATEMENT OF CASE FOR APPELLANTS.

The Chicago Danville & Vincennes Railroad Company was incorporated by special charter from the State of Illinois, approved February 16, 1865. The act was declared to be a public one. It gave to the corporation perpetual succession, with authority to locate, construct and complete a line of railroad from Lawrence County, Illinois, upon the most eligible route, to and into the city of Chicago, by way of Paris and Danville. Its right of way was declared to be the fee simple property of the corporation.

Its borrowing powers were fixed as follows:

"SEC. 13. That the said railroad company, by this act incorporated, shall have power to borrow money on the credit of the company, not exceeding its authorized capital stock, at a rate of interest not exceeding ten per cent. per annum, payable semi-annually, and may execute bonds therefor with interest coupons thereto affixed, and secure the payment of the same by mortgage or deed of trust on the whole or any part of said railroad property and income of the company *then existing or thereafter to be acquired*, and may annex to said mortgage bonds the privilege of converting the same into the capital stock of said company, etc."

In execution of this power the railroad company on March 10, 1869, executed, acknowledged and delivered a mortgage or trust deed to William R. Fosdick and James D. Fish, as trustees, to secure the payment of $2,500,000 gold bonds. The bonds were declared on their face to be first mortgage bonds. The property covered by the mortgage and standing as their security was:

"All and singular the entire railroad of the party of the first part, lying, being and extending from its terminus in the city of Chicago, Cook County, Illinois, southerly through the counties of Cook, Will, Kankakee, Iroquois and Vermillion, to the city of Danville, and thence southeasterly to a point on the State line of Indiana, joining and connecting at said point with the Evansville, Terre Haute, and Chicago Railroad, being in length about 140 miles, with all its franchises, equipments, property, tolls, issues and profits, and all its lands, tenements, buildings, fixtures, machinery, goods and chattels, connected with or used in the using or operating of said railroad, or appurtenant thereto, and all its rails, ties, fuel, fencing and erections, and all its rights of way and easements, and all cars, engines and tools, and all rents, reservations and reversions of every nature and kind whatever, including all the property between said terminal points which said party of the first part now has or owns and possesses, or may hereafter acquire either in law or equity, of every kind whatever pertinent thereto."

An explicit covenant was contained in the mortgage that the corporation should execute conveyances by way of

further assurance for all property or rights thereafter to be acquired by it.

It was also agreed that on six months default of interest after presentment and demand, the principal of all the bonds should become immediately due and payable, and on demand of the holders of at least one-half the then outstanding bonds, the trustees should enter upon the actual possession and management of all the granted premises, receive all the income, issues and profits thereof, make sale of the mortgaged premises as an entirety, convey the same, and apply the proceeds, after deducting expenses of sale and management, to the payment of interest and principal of said bonds.

This mortgage, in March, 1869, was duly recorded in each of the counties into or through which the line of railroad was situate.

The entire amount of bonds provided for by the mortgage were negotiated by the corporation shortly after their date, and the road was constructed and put in operation.

On February 27, 1875, a bill was filed in the Circuit Court of the United States for the Northern District of Illinois, by the Trustees, Fosdick and Fish, against the railroad company, praying for a foreclosure of the above named first mortgage and a sale of the property.

The amended bill with its exhibits is part of the record on this appeal. It alleges the issue of the 2,500 bonds, the execution and record of the mortgage, a default in the payment of interest thereon on October 1, 1873, and continuously thereafter, the insolvency of the corporation, a demand of the holders of a majority of the bondholders to enforce their security, which is claimed to be a first lien on all the line of railroad and property of the company in existence at the date of instituting such proceedings.

A receiver of all the mortgaged property was appointed with the usual powers of management, who continued in

possession until the sale of the road, and its conveyance to the purchasers.

Pending the proceedings, certain representative bondholders were admitted as parties, to protect their interests and speed the cause.

The corporation answered, admitting the execution and record of the mortgage, and that it was a first lien on the property.

A final decree of foreclosure was enrolled in December, 1876. It finds the material averments of the bill to be true, and accordingly decrees that the said trust deed "was and still is *a first lien* upon all of the railroad, property, franchises and appurtenances in said deed of trust described," and orders the property to be sold by the master to pay the first mortgage debt of over $3,000,000, in gold. The railroad, together with its equipments, appurtenances and franchises was sold by the master on Feb. 7, 1877, to Frederick W. Huidekoper, Thomas W. Shannon and John M. Deamison, for the sum of $1,450,000. After confirmation the master conveyed the property to the purchasers by deed dated April 16, 1877.

Pending the litigation, Michael Schall filed an intervening petition on Jan. 27, 1876, alleging in substance that by a contract of February 1, 1873, he agreed to furnish 225 coal cars to the mortgagor corporation at $700 per car delivered at Pittsburg; $20 per car to be paid on delivery, and the balance in monthly notes of $20 for each car; the title to such cars to remain in Schall until the whole purchase price was paid. The cars were all delivered, and notes were given in accordance with such contract. Payments have been made to the amount of $44,323.43 leaving $110,336.14 unpaid, or $490.38 per car. The last payment was made Oct. 14, 1874, and the money received on such contract will amount to no more than a fair rental up to August 22, 1874. That $7 a month per car would

be a reasonable compensation for the use of the cars from August 22, 1874, to May 1, 1875. He prayed for an order directing such payment and for a re-delivery to him of the 225 cars.

The original contract for the sale of the cars is as follows: "NEW YORK, February 1st, 1873.

"*Sold this day for account of*

"MR. MICHAEL SCHALL, of York, Penn.

"TO THE CHICAGO, DANVILLE AND VINCENNES RAILROAD CO. Office, No. 38 Pine Street, New York:

"Two hundred (200) eight-wheel Gondola Coal Cars, as per specifications and agreement made by Mr. J. E. Young, and herewith attached.

"Price, delivered on the track at Pittsburg, at depot of P. C. & St. L. R. R., seven hundred dollars per car. Cars to remain the property of Michael Schall until paid for.

"Delivery to commence, and cars to be taken, on or before March 1st, and at least twenty-five (25) cars in each week thereafter until all are delivered, the seller having the option of increasing the number of cars to be delivered per week if desired.

"Settlement to be made on delivery of each twenty-five (25) cars, or more, at the option of sellers, with the notes of the Chicago, Danville, and Vincennes Railroad Company, payable in the City of New York, and adding interest at the rate of ten per cent. per annum. The first notes are to be drawn at sixty days from date of delivery, and for twenty (20) dollars on each car, and the balance for a like amount and payable monthly thereafter.

"Cars to be lettered and numbered as per directions of Mr. Young.

"Invoice and shipping receipts to be sent to the Railroad Company's office, No. 38 Pine St., New York.

"It is understood the sellers shall not be responsible for the acts of Providence, Strikes of Workmen, or other causes beyond their control, which may retard and delay the manufacturing and delivery of the said cars as above stated.

"Shipping receipts to be evidence of delivery.

"(Signed) MICHAEL SCHALL.

"I hereby accept the above proposition for the R. R. Co.

"(Signed) J. E. YOUNG.

"Gen. Manager."

The trustees and certain first mortgage bondholders who had intervened by leave of court, filed an answer to such petition claiming that on delivery the title to the cars passed to the railroad corporation, and became subject to the lien of their mortgage. That the written contract purporting to retain title in the vendor, notwithstanding their delivery to, and possession and use by the company, was void, because not acknowledged or recorded according to the laws of Illinois, and therefore the petitioner had no lawful right to their possession or rent. They further denied that any of the income or proceeds of sale could legally be appropriated to the payment of such car rental to the exclusion of bond payment, or that the receiver had any right to redeliver cars.

The matters of the petition were referred to the standing master to take evidence and report. On April 23, 1877, he filed his report, together with the testimony taken, consisting simply of the evidence of the receiver showing the unrecorded contract, delivery of the cars, the continued use and possession thereof by the company and receiver, the payments made on the original contract price, and the rental paid by him. Exceptions were interposed by the trustees and bondholders to the master's report, because it was not supported by the evidence, and contrary to law.

Oct. 6, 1877, upon hearing of the exceptions, the Court made order on the petition, reciting the contract, that the company had the use of the cars for six months prior to the appointment of receivers; that the former receivers had also used same without paying rental; that $7 per car per month was fair rental, and thereupon decreeing that petitioner was entitled to $9,450 as a just claim for supplies upon the fund in court, for use of cars for the six months prior to the appointment of receivers, and the further sum of $5,188.75 for the rental from Feb. 22, 1875,

to May 31, 1875, during which the cars were used by the former receivers.

The clerk was ordered to pay petitioner $14,568.75 out of the proceeds of sale of the railroad, and the purchasers of the road were required to deliver to him the 225 cars within 60 days.

From this decree ordering delivery of the cars, and the payment of money to petitioner out of the proceeds of the sale, trustees and intervening bondholders prayed an appeal to the Supreme Court, which was allowed, and has been perfected.

Errors Assigned by Appellants.

1. The decree of the court awarding payment of car rental for six months prior to the receivership, out of the sale proceeds, was contrary to law.

2. The decree awarding payment of car rental out of the sale proceeds for the period the cars were used by the first receivers, was erroneous.

3. The title to the 225 cars passed to the railroad company on delivery, and the property became subject at once to the lien of the first mortgage, because the written contract, undertaking to reserve title in the vendor, was not executed, acknowledged, or recorded, as required by law.

4. The court erred in making the allowance to the petitioner out of the proceeds of the sale of the mortgaged premises, in preference to the payment of the bonds which were explicitly secured thereby.

5. The court erred in decreeing any title or relief to said Schall, based on such illegal and unrecorded contract.

ARGUMENT FOR APPELLANTS.

This appeal involves only questions of law. The facts are without controversy, and can be briefly stated.

A railroad corporation of Illinois executed a first mortgage upon all its property to secure an issue of bonds. The conveyance was in every respect valid. It was duly recorded in March, 1869, in all the counties in which the road was situate.

A fund is in the registry of the Circuit Court, arising exclusively from a sale of the railway under a foreclosure of that mortgage. The entire sale proceeds will pay less than half the amount decreed to be due on the bonds secured thereby.

A car manufacturer, in 1873, sold 225 cars to the railroad company, for $700 each. The written contract of sale declared "the cars to remain the property of Michael "Schall until paid for."

This contract was never acknowledged or recorded.

The cars were all delivered to the company, remained in its continued possession and use for about two years, then passed into the custody of the receiver until the road was sold by the master, when they came into the possession of the purchasers.

Prior to the receivership payments to amount of $44,323.43 had been made on the car contract, leaving then due on the company's notes $110,336.14.

On these facts, the bondholders and their trustees, relying on the priority of their recorded mortgage of 1869, claimed that their lien bound the cars from their delivery, and the entire proceeds of the sale ought therefore to be distributed to the holders of bonds secured by that conveyance, in preference to any other creditors.

At the circuit the vendor of the cars defeated the priority claimed for the mortgage bonds and recovered out of the

sale proceeds $9,450 for car rental for the six months prior to the foreclosure suit, $5,188.75 for like use during a portion of the receivership, and also title and re-delivery of the cars.

Whether the eminent equity judge who pronounced these rulings has correctly apprehended and enforced the respective rights of the bond and other creditors upon the fund in court, is to be resolved upon this appeal.

The errors which underlie the decree may be fully considered under two propositions.

I.

EVEN IF IT SHOULD BE FINALLY DECIDED THAT THE TITLE TO THE CARS HAS ALWAYS BEEN IN SCHALL, THE CIRCUIT COURT HAD NO LAWFUL POWER TO DEFEAT THE FIRST MORTGAGE SECURITY, BY APPROPRIATING ANY PART OF THE PROCEEDS OF SALE TO PAY A CAR RENTAL LIABILITY, INCURRED BY THE MORTGAGOR CORPORATION, YEARS AFTER THE LIEN OF THE MORTGAGE HAD BECOME FIXED AND PARAMOUNT.

The Circuit Court, in ordering payment of the $9,450, must obviously have proceeded upon the theory that the ownership of the cars was in Schall. It will be argued hereafter that the title was not in him as against the mortgagees. At present it will be contended that, even on the chosen theory of the court below, the recoveries against the fund ought to be reversed, because it can be demonstrated they are contrary to well established principles of law, and founded in violation of an express statute which determines the rights of the contestants.

The validity, character, or amount of Schall's claim as *against the corporation*, are not involved in this contro-

versy. Neither is this a contention over the distribution of net income realized from the working of the railway by the receiver. The precise question is—can a fund arising exclusively from a foreclosure sale, although grossly inadequate to pay the mortgage debt, be legally seized upon, by a court of equity and appropriated to the payment in full of an open debt of the mortgagor, which had been incurred years after the record of an encumbrance, specifically charging the property sold?

This judicial action in decreeing that the debt last created should be first in the order of payment, must obviously be justified on the theory that the car rental constituted a preferential charge, either on general legal principles or by virtue of some positive statute, or because a court of chancery in the foreclosure of a railway mortgage is vested with a peculiar discretionary jurisdiction to enforce the payment of liabilities incurred for labor and supplies purchased for or used in the operation of the road.

On any of these grounds the decree is wholly indefensible.

1. If the rights of the contestants are to be tested by those legal principles which have so uniformly established and protected the estate of mortgagees under the registry laws, the result would plainly reverse the decree.

The lien of appellants' mortgage became effective in March, 1869, by its record. Indeed the Court decrees it a first lien.

The elementary doctrine underlying the recording acts is, that any creditor claiming under a contract relating to the mortgaged estate made after the record of the encumbrance and without privity of the mortgagee must hold his rights subject in all things to the prior mortgage.

Rogers v. *Humphreys*, 4 Ad. & El., 299.
Haven v. *Adams*, 4 Allen, 80.
Crosby v. *Harlow*, 21 Maine, 499.
Ellis v. *B. H. & E. R. R.*, 107 Mass., 1.

The Statute of Illinois is express :

"The record of all such deeds, mortgages or other instruments in writing so acknowledged as aforesaid shall be taken, and the same is hereby declared to be good and effectual in law, to charge any purchaser, mortgagee or creditor with notice of the existence of such deed, mortgage or other instrument in writing from and after the time when such deed, mortgage or other instrument was actually filed for record in the proper office."

Gross' Stat., Chap. 24, § 19.

The judicial construction of this act has with unvarying strictness charged subsequent creditors with full notice of the rights of the first recorded lienor and ruled that it was impossible for them to acquire any greater estate or equities in the encumbered estate than was possessed by the mortgagor.

Warner v. *Helen*, 1 Gilm., 220.
Kruse v. *Scripps*, 11 Ill., 98.

This principle subordinates all later engagements of the mortgagor, whether by alienation, judgment, lien, lease, or executory contract of any kind.

In the absence of some restrictive statute in force when the first mortgage is executed and recorded, the rule is of universal application that all later liens, whether by express contract or arising by operation of law, are restricted in their operation and enforcement to the residuary interest of the owner after full satisfaction of the elder encumbrance of record.

Judson v. *Stephens*, 75 Ill., 257.
McCarty v. *Carter*, 49 Ill., 53.

In those States where by express legislative enactment a lien is given to mechanics for labor or material furnished for the improvement of premises, the rule of priority is unchanged.

The statutory lien is judicially treated as an *in invitum*

hypothecation of the land, effected on the day when the work is begun or materials delivered.

If such date is subsequent to a duly recorded incumbrance, the mechanic accepts his statutory lien with full notice, and therefore he can neither recoup the improvements incorporated in the mortgaged premises, nor have his claim preferred to the mortgage.

The action of the lower court distinctly repudiates this most essential principle, and is contrary to all the authorities.

The Supreme Court of Tennessee thus states the true rule of priority between the mortgagee and a subsequent improver of the premises:

"Nor is the mortgagee bound to concur in making repairs, or liable in any sense for the expense without his consent. The case then results in this: that repairs were made at the request of the mortgagor, and upon his credit. The mechanic was also entitled to a lien on the mortgagor's interest in the land as a security for the payment. But as there was a prior lien of which the mechanic had notice, and as the interest of the mortgagor is subject to that lien, the mechanic could acquire no greater or higher interest by his contract with the mortgagor than that which the mortgagor possessed. The mechanic knew, or might have known, of the existence of the prior lien, and has no cause to complain that it is entitled to priority of payment. Under a different rule it would be in the power of the mortgagor to destroy the security by erecting costly improvements, the expense of which the estate improved could not be able to pay; and therefore the mortgagee is entitled to priority of payment over the lien of the mechanic for work done after notice of the existence of the prior lien, and the registry of the mortgage is such notice."

Reed v. *Bank of Tenn.*, 1 Sneed, 262.

In a case where priority was claimed on the improvements only, the court said:

"Conceding counsel to be correct in saying that the lien on the building is absolute, still we do not think that the position that it is prior to that of a previously existing en-

cumbrance upon the land can be maintained. At no time can the lien of the mechanic be said to reach back and cut off that of a prior mortgage or other previous encumbrance."

Jesup v. *Stone*, 13 Wis., 466.

"According to the universal interpretation of such statutes, the mortgagor, while in possession, may bind his interest in the premises, but he has no power to prejudice the estate of the mortgagee without his consent."

Otley v. *Haviland*, 36 Miss., 19.

The Supreme Court of California declined to discuss the subject, saying:

"It is useless for us to adduce any argument in support of the proposition that a mortgage of land carries with it all buildings which are or may be attached to the freehold, and that the rights of the mortgagee cannot be defeated by mechanics' liens, or other encumbrances created without his consent."

Prior v. *Murrie*, 4 Cal., 175.

This court, in a very early case, enforced the same principle.

"The claim, therefore, of the purchaser with notice, to have the value of the improvements which may have been made from the fruits of the property itself, deducted from the price at which the property was sold, seems to the court too unreasonable to admit of a serious argument in its support. No case was cited, nor has this court met with one which affords it the slightest countenance. We must, therefore, overrule this objection."

Hughes v. *Edwards*, 9 Wheat., 500.

Since followed in

Minn. Co. v. *St. Paul Co.*, 2 Wall., 609.

Butt v. *Ellett*, 19 Wall., 544.

A vigorous statement of the rule, and the reasons justifying it, is made by the Supreme Court of Iowa:

"In the case of a mortgage upon land and the buildings thereon before the mechanics' lien attached, the mortgagee will hold the property as against the mechanic.

"How is it when improvements in the nature of addi-

tions or repairs to the building are made after such mortgage?

"The mortgage binds the house; the improvements of the character indicated become a part of the house, and are, as it were, incorporated with it. After the improvements are made, they do not remain separate and distinct from the building. They have lost their distinctive character. The house includes them; they are a part of it, and as such are covered by the mortgage. For the reason that the mortgage binds the improvements as a part of the house, the mechanics' lien cannot defeat the mortgagee's rights.

"These views, we think, are based upon sound principles, and lead to equitable results. Should contrary doctrine prevail, it would be within the power of a mortgagor to ruin the security of his creditor, by making improvements upon the building covered by the mortgage, which in fact and in law, would be but part of the building itself. The case before us serves to illustrate the injustice of such a rule. The mechanic or material man cannot complain. He had notice of the mortgage, and knew, or was bound to know, the purposes for which the materials were furnished or work was done by him."

Getchell v. *Allen*, 34 Iowa, 562.

In Illinois, the highest court has had frequent occasion to construe these lien laws.

It has declared certain fixed principles of their interpretation.

That the lien is acquired at the date when the work or material is furnished.

Smith v. *Hughes*, 24 Ill., 270.

The governing principles upon which priority of lien must be based, is that the vested rights of purchasers or encumbrancers, cannot in any manner or to any degree be affected or displaced when once attached, by any rights subsequently accruing to mechanics.

Williams v. *Chapman*, 17 Ill., 423.

McLagan v. *Brown*, 11 Ill., 519.

In case of an ordinary foreclosure, it would doubtless

be conceded that the principles thus explicitly announced would be controlling, and that the Circuit Court would have no rightful power to invade and annul the clearly defined statutory priority of the bondholders by devoting any part of their distributive share of the sale proceeds to the payment of any junior liability or contract of the mortgagor.

The only claim to emancipate this decree from the control of these ordinary rules applicable to real estate mortgages, must be based upon the theory that mortgages upon railways are exceptional in their character.

This is no longer an open question.

The legislature gave this corporation power to "mortgage" its property to secure bonds. That power, granted to the artificial person, had a fixed and definite meaning in the law.

The mortgage, as to its execution, acknowledgment and record, was left to the operation of those laws and statutes which are applicable to mortgages made by natural persons.

On default they are enforcible by chancery, and the rights of the creditors secured thereby are to be protected by the same legal principles as to registry and priority which preserve the vested rights of other mortgagees.

To this the authorities are express.

The attempt to effect a distinction operating to the prejudice of the mortgage bondholders of a railway, was most distinctly repudiated by this Court at a very early period in the history of this class of securities.

"Conceding the general rules of law to be as here laid down, still an attempt is made by the respondents, to maintain that railroad mortgages made to secure the payment of bonds issued for the purpose of realizing means with which to construct the road, stand upon a different footing from the ordinary mortgages to which such general rules of law are usually applied.

"Authorities are cited which seem to favor the supposed distinction, and the argument in support of it was enforced at the bar with great power of illustration, but, suffice it to say, that in the view of this Court the argument is not sound, and we think that the weight of judicial determination is greatly the other way."

The Supreme Court of Illinois, in construing a similar railway mortgage, used the following language:

"The charter of this road authorized it to issue bonds, and secure the payment of the same by mortgage, or deed of trust, on the whole or any part of the road property and income of the company, then existing or thereafter to be acquired.

"Nowhere do we find any provision made as to the mode of acknowledging or recording these mortgages, or of the effect they shall have upon the rights of subsequent purchasers or creditors. This seems to have been left, by the legislature, to be influenced and controlled by the general law of the State on the subject.

"Where the charter, or a general law of the State, authorizes a railroad company to mortgage either its real or personal estate, and provides no mode of execution or recording, and specifies no form for the instrument, and declares no effect which it shall have upon the rights of the parties, or others, it would seem to follow necessarily, that such mortgages must be subject to and governed by the general laws of the State regulating mortgages; at least so far as the general laws are applicable to the subject matter of the mortgage.

"The trustees took possession as mortgagees, for condition broken, in pursuance of their right distinctly expressed in the trust deed, and the duties of mortgagees in possession are imposed upon them not only by the law, but by the special provisions of the trust deeds and the deed of possession, and these rights and duties are very different from those of an assignee of a failing debtor for the benefit of his creditors. The former are not bound to know, and indeed have no right to know, that there are any debts except the mortgage debt, and when that is paid they must surrender all the residuum to the debtor."

Palmer v. *Forbes*, 23 Ill., 248.

Dunham v. *Railway Co.*, 1 Wall., 268.

Instead, therefore, of a lax construction of such conveyances, tending to a diminution of the estates and priorities of mortgages as ordinarily understood, the consistent practice of the Courts has been to impress upon them a liberal interpretation, and so amplify usual equity remedies as to most thoroughly enforce the security.

The bondholders' right upon the fund is determined by their lien upon the property whose sale produced it.

Their lien became vested in April, 1869, upon the entire railroad and its appurtenances.

Schall's claim arising years later is clearly subordinate, and consequently not entitled to any share of the fund until full payment of the bonds.

That such are the rights of the litigants according to fundamental principles, cannot admit of serious challenge.

Usual precedents, therefore, convict the decree below of palpable error, in displacing the priority of the recorded lien.

2. It is equally true that no warrant can be found in any legislation of Illinois for the decree giving preference to the engine manufacturer.

A railway being *quasi* public work, owned and operated by an artificial person, having only such capacity as the legislature chooses to grant, it is usual, by express statute, to vest borrowing powers and authority to create even an express contract lien.

In the absence of clear and positive enactment, it has been ruled that a railroad company cannot create a statutory charge upon its line of road by incurring a liability for improvements.

Dunn v. *North Mo. R. R.*, 24 Mo., 493.
McAuley v. *West Vt. R. R.*, 33 Vt., 323.

The general mechanics' lien law of Illinois does not, either in terms or by implication, embrace claims for labor

or material furnished to a railway either for the construction, improvement or operation of the road.

The only statute purporting to cover this class of liabilities and authorize a lien upon railroads, is an act passed and in force July 1, 1872, as follows:

"All persons who may have furnished or shall hereafter furnish to any railroad corporation now existing or hereafter to be organized under the laws of this State, any fuel, ties, material, supplies, or any other article or thing necessary for the construction, maintenance, operation or repair of such roads by contract with said corporation; or who shall have done or performed, or shall hereafter do and perform any work or labor for such construction, maintenance, operation or repair by like contract, shall be entitled to be paid for the same as part of the current expenses of said road, and in order to secure the same, shall have a lien upon all the property, real, personal and mixed of said railroad corporation, as against such railroad and as aginst all mortgages or other liens which shall accrue after the commencement of the delivery of said articles or the commencement of said work or labor, provided suit shall be commenced within six months after such contractor or laborer shall have completed his contract with said railroad corporation, or after such labor shall have been performed or material furnished."

Rev. Stat., Ill., (1874,) p. 671, § 51.

The statute embraces *inter alia* fuel, ties, material, supplies, or any other article or thing necessary for the operation of such road.

It is not the purpose to claim any narrow construction of the act as to the class of claims included in it. Cars are necessary for the operation of a railroad; should an owner of cars, by an unequivocal contract of rental lease his equipment to an Illinois railroad corporation, it might under a fair construction of the law, be considered furnishing a supply or other article or thing necessary for the operation of the road, and therefore the car rental liability might be entitled to the precise rights and remedies of the statute.

The nature and extent of this statutory right, and especially when invoked as against prior and fixed encumbrances, is not a matter of doubtful construction.

In determining whether a reading is to be put upon a lien law that would overreach prior encumbrances, very strict canons of construction are adopted by the courts.

In the case of *Morgan* v. *Cincinnati*, 3 Wall., 275, where the attempt was made to impress upon an advance of money by a city to a railroad company, a statutory charge paramount to the mortgages, this court said:

"It is insisted it was not only a charge, but a charge prior to the first mortgage, in effect overriding all liens and postponing them. Certainly a statute that can have such a peculiar and strikingly inequitable effect and operation, should be very explicit and positive in order to obtain the assent of a court of law or equity."

And later:

"Mortgagees and others acquiring interest in property against which such a lien is sought to be enforced, have a right, therefore, to call for strict proof of all that is essential to the creation of the lien."

Davis v. *Alvord*, 4 Otto, 545.

In discussing the effect to be given this class of legislation, creating a charge upon land unknown to the common law, the Supreme Court of Illinois designate it as a statute opposed to common right, to be strictly construed, and in no case extended beyond its terms.

Cook v. *Heald*, 21 Ill., 425.
Brady v. *Anderson*, 24 Ill., 112.
Stephens v. *Holmes*, 64 Ill., 336.

This construction given to the local statute by the highest judicial authority of the State, is as controlling on the Federal Courts as though it constituted the text of the statute.

Leffingwell v. *Warren*, 2 Black., 599.
Nichols v. *Levy*, 5 Wall., 433.
R. R. Tax Cases, 2 Otto, 575.

It will be seen upon examination that the plain letter of the statute, instead of displacing prior liens to any extent whatever, has been cautiously framed to protect them, in precise harmony to the correct principles which have been noted.

The lien created by the statute is most explicitly defined and bounded.

The charge is "upon all the property, real, personal and mixed, of said railroad corporation, as against such railroad, *and as against all mortgages or other liens which shall accrue after the commencement of the delivery of said articles*," etc.

Mortgages or other liens which accrued *before* the commencement of the delivery of such articles, are left wholly untouched by this statute. Their priorities already assured by the registry laws, were further designed to be protected by express legislation, and as against them the material man has under this statute no lien whatever. His only claim under the law will be to take his incumbrance as of the date when his supplies were first delivered, and if any surplus is left after full payment of the precedent mortgages, to assert his claim upon that, as against the liens which accured after his lien had become vested.

Two recent cases in this Court illustrate the cardinal feature of such enactments:

In *Davis* v. *Bilsland*, 18 Wall., 661, and *Fox* v. *Seal*, 22 Wall., 437, this Court postponed mortgages to mechanics' liens, exclusively upon the ground that by the statutes of the State the lien thereby created for improvements upon realty, was explicitly fixed "at the date of the commence-
"ment of the work." In the cases then under discussion, the mortgages had been executed after the mechanic had begun work, and the mortgagees had therefore actual notice of the existence of the prior statutory lien.

In this case the conditions are exactly reversed.

The first mortgage which the Circuit Court displaced by this decree did not accrue after, but five years before, the sale of the cars, or their delivery to the company.

By the clear language of the only law which could create any lien whatever, it is declared that against such a prior mortgage the statutory charge was wholly inoperative.

If Schall had, in apt time, instituted an equitable his action in his own name, to enforce a statutory lien on the railroad property by reason of his claim for car rental, he could only have obtained a decree limited to the company title, and that of such mortgages as had accrued after the date of beginning the delivery of his cars.

The statute would distinctly prohibit the court from disturbing the earlier encumbrances.

Surely the rights of a lienor cannot be amplified, because it seeks to enforce them as an intervenor in a foreclosure case, instead of as an original complainant.

If, therefore, appeal is made to the statutes of Illinois to support the claim below, it suffices to answer. The act is definite, free from all ambiguity, and capable of but one interpretation. A lien upon railway property is given for supplies or material used in operating the road. It is, however, limited in its character. The statute declares it shall have no operation against prior incumbrances; such limitation is in full accord with ordinary legal principles, Applying the statutory limitation to the petitioner's claim, the mortgage bonds ought not to have been postponed, but should have enjoyed the whole fund.

Other tests will reverse the decree.

The character of the car contract, as to the period of credit extended to the corporation, and the date of instituting legal proceedings by Schall to enforce his claim, did not authorize the court to decree any statutory lien whatever.

The law only fixes the lien "provided suit shall be com-"menced within six months after such material shall have "been furnished."

The cars were all delivered to the company in 1873. Suit to foreclose the mortgage was instituted in February, 1875. The petition to enforce the claim was filed by Schall, January 27th, 1876, nearly three years after the first car deliveries were made. This was "the commencement of suit" to enforce his claim of lien. The bar of the statute was complete. After the lapse of six months the statutory charge became utterly extinct, incapable of any judicial enforcement, and the court possessed no power whatever to revive a lien which the statute had declared should no longer exist. The limitation on such claims is matter of substance, and if the action is not instituted within the statutory period, no right at all can be decreed under it at a later date.

Green v. *Jackson Water Co.*, 10 Cal., 374.
Green v. *Ely*, 2 G. Green, 508.
Lunt v. *Stephens*, 75 Ill., 512.
Arbuckle v. *Ill. Midland Ry.*, 81 Ill., 431.

The written contract shows clearly that it was never in the contemplation of the parties that resort should be had to a statutory lien.

The rule is well settled, in the interpretation of such laws, that when a mechanic chooses to give so extended a credit that the final payment does not mature until after the time when a lien must be enforced by legal action, he will be deemed to have voluntarily waived his lien, and relied on the personal security of the party to whom the credit was given.

Phillips on Mech. Liens, § 281.

Says the Supreme Court of Kentucky on this point:
"It was obviously the intention of the Legislature to

limit the duration of the lien, and to require its assertion by suit within the time prescribed. If no suit be brought within the year, the lien given by the statute is lost, there being no other mode allowed for its enforcement. The necessary consequence would seem to be that if a party places himself in a position which renders him unable to bring a suit to enforce the lien within the time limited, he thereby virtually renounces it, having deprived himself by his own voluntary act of the right to enforce it."

Pryor v. *White*, 16 B. Mon., 605.

The cost price of the cars was $700 each. Of this, $20 was paid in cash, and the balance was evidenced by thirty-four notes of $20 each, maturing monthly after April 1, 1873.

The term of credit was, therefore, thirty-six months from Feb. 1, 1873.

The three years' credit granted by the notes is utterly inconsistent with the idea of a statutory lien, the indispensable pre-requisite of which is that it must be enforced, if at all, by suit brought within six months from the delivery of the material.

Judged by the statute, therefore, the petitioner had no priority over the mortgage bonds of 1869, because his inchoate statutory lien for material furnished is expressly subordinated to the senior mortgage.

The credit given by the contract extended two years and a half beyond the time within which the lien must be enforced by suit.

The petition filed Jan. 27, 1876, to establish the lien was expressly barred by the statutory limitation of six months.

3. If the Circuit Court had no power, according to the ordinary legal principles applicable to mortgages, or under any statute, to divest or postpone the recorded lien of the first mortgage, the inquiry remains, whether the Chancellor is vested with some exceptional jurisdiction to decree a

preference to the operating debts of a railroad corporation before the mortgage lien is recognized.

The attempt will, without doubt, be made to sustain the decrees upon some such theory.

It will be urged that equity constrains a Chancellor to liquidate the corporate liabilities necessarily incurred in operating the railway; that they are in effect expenditures for the benefit of the mortgagee's security, which a Court of Chancery at its discretion can decree shall be paid out of the property in its custody in preference to the bonds.

Under cover of such specious appeals to what are designated the "principles of natural equity," this class of junior claims have in many recent cases of railway foreclosures, secured judicial recognition to such an extent that the value of the bondholders' security has been most seriously damaged and in some instances been threatened with practical extinction.

The result is accomplished in this manner. A railroad company makes default on its first mortgage bonds. It is insolvent, the security is inadequate, and there is a large accumulation of debt for labor and supplies.

Suit to foreclose is instituted and a receiver appointed. Intervention is, thereupon, made by a legion of floating creditors. The appeals of this necessitous and clamorous class address themselves to the sympathy rather than the judgment of the Chancellor.

Yielding to the promptings of this sentimental equity, orders are entered on the petitions of the ordinary creditors, requiring the receiver to apply the net income of the road to their payment, and if the receiver's earnings be inadequate, it is ordered that the sale proceeds arising under the final decree of foreclosure shall be applied to their full payment before the mortgage debt.

The bondholders have then no recourse but to appeal,

supersede the decree, and suffer the damage consequent on the postponement of the re-organization of the property for several years, or incur the heavy expense of protecting their security by raising the large sum of money necessary to clear off the allowances decreed on the junior claims. This generally embraces all labor and supply debts of the railroad company incurred in the six months anterior to the institution of the foreclosure suit, frequently aggregating several hundred thousand dollars.

It is not possible to conceive of a more dangerous judicial heresy.

In the interest of the large values invested in this class of negotiable securities, it is highly necessary that this Court of last resort should authoritatively decide whether the Circuit Courts of the United States, in the absence of express legislative support, do in fact possess a roving commission to invade in such manner a security definitely fixed by law, and effect a confiscation of the vested rights of bondholders.

As a substantive proposition, it would be a most amazing paradox to claim for a court of equity the power to create a lien upon property. Such authority was never asserted to be properly referable to the domain of what is termed the discretionary jurisdiction of chancery.

Liens are created either by express contract of the parties or arise by operation of some statute. The function of a Court of Chancery is to enforce such. There its jurisdiction ends. It has no creative power whatever. The mere fact that a claim presented is in conformity with the principles of natural justice and equity is not sufficient to authorize such arbitrary exercise of jurisdiction.

Howe v. *Shephred*, 2 Sumner, 409.

Hardships create no equities.

Even the performance of a benefit to realty by the erection of valuable and permanent improvements will not

vest any power whatever in a Court of Chancery to decree the debt to be a fixed charge upon the land improved.

Independently of statute no equitable principles exist which can aid the mechanic. The whole system of such liens is artificial. It derives its existence and efficacy from positive legislation, and not by reason of any natural equity.

The whole doctrine was summed up by Field, J., in delivering the opinion of the Court, in *Ellison* v. *Jackson Water Co.*, 12 Cal., 554.

"The plaintiff cannot, therefore, maintain the lien he asserts under the statute, and outside of the statute there is no lien which can be enforced. Equity raises no lien in relation to real estate, except that of a vendor for purchase money."

Spencer v. *Barnett*, 35 N. Y., 94.
McNeil v. *Borland*, 23 Cal., 144.
McCoy v. *Quick*, 30 Wis., 521.

Says the Supreme Court of Illinois: "It is a mistake to suppose that the Court creates or confers the lien by its decree. The Court only finds and declares that it was in existence. It has no more vigor as a lien after than before the decree."

Clark v. *Moore*, 64 Ill., 275.
Croskey v. *N. W. M. Co.*, 48 Ill., 480.

As a logical result of the proposition, that the lien is purely statutory, arose the doctrine of strict construction.

"The lien as given by statute is in derogation of the common law, is secret in its nature, no notice being required by record or otherwise, either to creditors or purchasers, and it should, therefore, receive a strict construction. This lien, like all others of the same character, should be fairly enforced when the party brings himself within the provisions of the statute, but it should not be extended to cases falling within the reason, but not provided for by the language, of the statute."

Brady v. *Anderson*, 24 Ill., 112.

Stephens v. *Holmes*, 64 Ill., 336.
Rothgerber v. *Dupy*, 64 Ill., 452.

When attempt was made to induce the Supreme Court of Illinois to enforce a lien not warranted by the statute, it was answered :

" We are forbidden to bring cases within it which the legislature have not included. Should we do so, we would be justly chargeable with judicial legislation. It is far better to leave omitted cases to the future action of the same power that enacts the law.

" We can see no justice or propriety in extending the law by liberal construction, which is partial in its operation, designed to benefit one class of the community over all others, and opposed to common right, *so as to create mortgages and secret liens in cases where the legislature have not said they should exist. We further say we have no right to create a lien when the statute has not.*"

Phillips v. *Stone*, 25 Ill., 80.
Cook v. *Heald*, 21 Ill., 425.

In treating of the nature of equitable jurisdiction invoked to enforce this species of liens, this Court ruled:

" The jurisdiction of the Court rests on the statute, and can extend no further."

Canal Co. v. *Gordon*, 6 Wall.

The system of erecting the debt created for the improvement of land into a specific charge upon the property benefited, is utterly unknown in England.

It has never been claimed that the English High Court of Chancery possessed the power on any exceptional equitable considerations, to supply the want of a parliamentary act, by creating and enforcing a lien by its decree.

The Circuit Courts of the United States can exercise no equity powers except those conferred by Congress, and those judicial powers which the English High Court of Chancery, acting in its judicial capacity as a Court of Equity, possessed and exercised at the time of the formation of the Constitution.

Fountain v. *Ravenal*, 17 How., 384.

If no instance can be cited from the whole range of English Chancery precedents when equity undertook to enforce a lien created neither by contract nor legislation, we can certainly conclude that the exercise of such a power by the Federal Courts is wholly extra-judicial.

Such is the well established limitation restraining the power of Chancery even as between the land owner and an improver. The illegitimate and dangerous character of the jurisdiction exercised in the decree in this cause can only be thoroughly appreciated, when it is considered that it not only assumes to create a lien as against the owner, but to enforce it to the injury of prior recorded encumbrances, contrary to every principle which distinguishes equity jurisprudence, repudiating the prohibition of express statute and the unequivocal commands of repeated precedents which it had no right to disobey.

The elementary principles of equity forbid such jostling of priorities as was attempted by this decree.

1. A Court of Chancery takes no note of special considerations attending the creation of debt.

All liabilities founded in good faith on valuable and adequate consideration, are equally meritorious in a Court of Chancery. The money loaned on bonds to originally construct and equip a railroad is entitled to equal favor with the claim of the laborer and material man who contribute to its later operation.

If, therefore, the debt upon the bonds was created years prior to the furnishing of supplies, and was first enforced by suit and sequestration of the property, the maxim, who is first in time is strongest in right, would require the payment of the bonds in preference to the material debts. The bondholders' right was a fixed legal one. Prior legal rights cannot be made to yield to later chance equities. To deprive a party of the priority given him by contract or statute, it must be against conscience for him to enjoy it.

2. But the statute fixed the right of the bondholder as a legal lien upon the property as of the date of record in March, 1869. As equity abhors secret liens, it would be a marvelous contradiction to postpone a recorded lien of five years' standing to a mere debt of recent creation, having no security attending it. It is the doctrine of equity that a party will not be relieved from the obvious consequences of his own contracts if he has failed to exercise common prudence. By the statute Schall was bound to take notice of the recorded mortgage, and entering into a later engagement with the mortgagor, he deliberately subordinated himself to the prior lien. Equity in such cases follows the law and has no power to place the last creditor in a better position than he voluntarily accepted, having full knowledge of all the facts. Chancery never overthrows a valid legal estate.

3. The charter of this railroad company authorized it to execute a mortgage of all its property then existing or thereafter to be acquired. *Ex vi terminorum*, this implied the security was to be paramount, continuous and effectual according to the known rules and usages of law. It contemplated no such absurdity as a mortgage security which the creditor had no absolute and complete right to enforce on default, but which might be attenuated and destroyed at a Chancellor's discretion, transforming it from a first lien into a refuse security, entitled only to such residuum of the property covered as might be graciously left it after the full satisfaction of later sentimental equities.

This trust mortgage actually conveyed the legal title of the property to the trustees. Upon the occurrence of a default on the bonds, they were empowered and required to take actual possession of the entire railroad, its equipments and appendages, sell and convey the same. It was declared that the deed on the execution of this power

should be a bar to the corporation, and all claiming under or through it subsequent to the date of the mortgage.

This power of sale is part of the security on which the creditor has a right to rely, and which a Court of Equity must respect and enforce on the occurrence of the specified default.

Hall v. *Sullivan R. R.*, 21 Law Rep., 138.
Shaw v. *Norf. Co. R. R.*, 5 Gray, 162.
Am. Bridge Co. v. *Heidelbach*, 4 Otto, 800.

When made, the conveyance under the power takes effect by relation to the date of the creation of the power.

It is the function of a Court of Chancery to enforce this right of entry and sale by its process, thus accomplishing the specific performance of the contract.

Gilman v. *Ill. & Miss. Tel. Co.*, 1 Otto, 616.
Dozes v. *Mueller*, 4 Otto, 444.

The mortgage contract covenants, that in the event of a sale, the entire proceeds, after expenses, shall be devoted to the payment of the bonded debt.

It would be a palpable breach of trust if the mortgage trustees, in the event of a sale by them, should apply any of the proceeds to the payment of any of the other debts of the corporation.

In the case of a judicial foreclosure the Court constitutes itself the substituted trustee to effectuate the security of the bondholders. They have the undoubted right, therefore, to insist that the distribution of the sale proceeds by the court shall be precisely that provided for by the trust deed in case of a non-judicial sale. Surely it is not competent for a court of equity to dispose of trust property in a manner which would constitute such a clear breach of trust by the designated trustee, as to authorize an injunction to restrain the diversion. Equity can no more commit a lawful breach of trust than can an individual. The Court has no

more right in a foreclosure case to prefer a subsequent debt of the mortgagor than the trustees would have.

It is matter of express and repeated decision by this and other courts that the appointment of a receiver in such cases is equivalent to an entry by the mortgagees, and that thereafter the income of the property would be theirs.

Am. Bridge Co. v. *Heidelback*, 4 Otto, 800.
Gilman v. *Ill. & Miss. Tel. Co.*, 1 Otto, 616.
Galveston R. R. v. *Cowdrey*, 11 Wall., 482.
Noyes v. *Rich*, 52 Maine, 116.
Boyd v. *Burke*, 8 Irish Eq., 660.
Howell v. *Ripley*, 10 Paige, 43.
Ellis v. *B. H. & E. R. R.*, 107 Mass., 1.

To acknowledge this principle as to the income, and yet claim that the Court holding the mortgaged estate *in custodia legis* can legitimately appropriate the proceeds of their sale to the liquidation of liabilities other than the bonds, is inconsistent and absurd.

The right to the income is necessarily based on the right to the property itself. There cannot be one scale of distribution for the net income and a different for the sale proceeds. The bondholders are entitled to both income and proceeds until they are fully paid. Subsequent creditors can only look to the surplus.

4. The statute which assumes to impress the quality of a lien upon corporate indebtedness for labor and supplies used in operating the railroad, was enacted in 1872.

The mortgage executed three years prior thereto, as to its extent, interpretation and remedies, is to be judged by the laws in force when it was executed.

Neither the charter nor the general conveyancing laws of Illinois then in force, nor the mortgage itself, furnished any notice to the purchaser of the bonds that there was any reserved power anywhere, either in the State or the

corporation, or the courts, to repudiate or alter the specific nature or priority of the obligation then created.

The ability of the corporation to negotiate its bonds to advantage depended largely—it might be said, altogether —on the inviolable character of the security which was incident to them.

If it had been clearly expressed in the mortgage that by subsequent legislation the company could be endowed with power to create a liability to be preferred to the bonds, the latter would necessarily have been regarded as practically unsecured. They would have commanded little value.

If it is now to be claimed that without any such expressed reservation either in the charter, or laws, or conveyance, the mortgagor corporation may, without consent of the mortgagees, create debts to supersede those specified in the mortgage, then it is obvious that the chartered grant to execute a mortgage was fraudulent, and the bonds have received fictitious credit. It is plain that the subsequent legislation of 1872 cannot be invoked to impair the obligation of the mortgage contract lawfully executed and recorded in 1869.

Yet under this subsequent statute, or by analogy thereto, it will be claimed this decree is justified.

It undertakes to withdraw from the mortgage some of the property. To that extent it dissolves and annihilates the lien, and impairs the obligation of the contract, and diminishes the value of the security.

Under the constitution, the State was wholly incapacitated from confiscating the bondholders' security by any legislation subsequent to the execution of the mortgage.

Wab. & Erie Canal v. *Beers*, 2 Black., 448.
Hawthorne v. *Calef*, 2 Wall., 10.
Von Hoffman v. *Quincy*, 4 Wall., 535.

If the State had no capacity by a solemn act of legislation to accomplish such result, the courts of the State were

equally powerless to repudiate the binding obligation of the contract as tested by the laws in force when it was made.

The mischievous and destroying power denied to the legislative and judicial departments of the State government can hardly be found to exist in our system of federal jurisprudence.

In a kindred attempt to diminish the security of a judgment creditor, this court observes:

"But the act reaches still further. It withdraws the land from the lien of the judgment, and thus destroys a vested right of property, which the creditor had acquired in the pursuit of the remedy to which he was entitled by the law as it stood when the judgment was recovered. It is, in effect, taking one person's property and giving it to another without compensation. This is contrary to reason and justice, and to the fundamental principles of the social compact."

Gunn v. *Barry*, 15 Wall., 622.

The Circuit Court had no more legitimate authority to take a portion of the mortgage security and devote it to subsequent corporate creditors, on any theory whatever, than to order it paid over to the corporation itself, and then let it pay its own floating debts.

In either event, it is taking the mortgagee's property against his consent; or decreeing that there is a reserved, secret, and repugnant power in the mortgage or the law, which enables the debtor, at his pleasure and without limit, to supersede the earliest security by the creation of subsequent debt — in substance, to re-take the estate without payment of the debt for which it was lawfully and distinctly pledged.

It has been well observed that such a decision "is calculated to overthrow the very foundation of contract rights, and virtually to destroy all securities in the form of liens upon property, and to convert an intended benefit attempted to be secured by solemn contract, of which the world had notice, into a positive disadvantage, and to make

the lack of an attempt to provide a contract for security, the very best possible security, through a supposed discretion of the Chancellor.

"The appellants accepted a security; the law attached certain incidents and priorities to that security. The later creditors had no security. Crash comes, and the party attempted to be secured is postponed until the creditor who has no lien is paid in full out of the property mortgaged to the other."

COFER, J. in *Douglass* v. *Cline*, 3 Cent. L. J., 659.

5. The debts created in operating the road after the mortgage may be meritorious as against the corporation. So are all liabilities resting on *bona fide* adequate consideration.

Equitable preferences do not arise as between equally meritorious creditors, still less is the elder required out of his property to discharge the junior.

But in the particular instance under discussion the claim lacks the ordinary equitable characteristics which belong to a mechanic's lien, chargeable against a mortgage. That is made a charge upon land because it visibly increases the mortgage security, and the policy of the statute declares the encumbrancer shall only enjoy the benefit of the added value on terms of compensation.

This principle might be appropriate to work done in the original construction, or permanent betterments or additions to the railway. But debts incurred for labor or supplies employed in the mere operation of the road, in no sense whatever add to the value of the mortgage security.

The operating labor has no effect but to produce the daily earnings which may be spent by the company.

The supplies, such as fuel, oil, waste and other material, are consumed in the use, and disappear.

Such labor and supplies are essential to the operation of the road, but they only serve to the production of income. These earnings when received are the exclusive property

of the company, with the disposition of which the bondholders have no concern.

This is the settled law of this Court.

Galveston R. R. v. *Cowdrey*, 11 Wall., 453.
Am. Bridge Co. v. *Heidelback*, 4 Otto, 800.
Gilman v. *Ill. & Miss. Tel. Co.*, 1 Otto, 603.

If the income produced by this labor and material is received and enjoyed by the mortgagor corporation, it would be a most inequitable proceeding, when the mortgagee makes actual or judicial entry, to charge up against him the mortgagor's debts created for the sole purpose of producing income, to which the bondholders had no right.

The use of the cars on the roadway can only result in wearing it out, and thus make renewals and repairs necessary. As to the cars themselves, the original vendor claims the right to withdraw them from the line as being his exclusive property. According to appellee's own claim, the bondholders have received neither income nor added value to their security by the use of the cars he claims as his.

There is consequently not even the meager ground of an enjoyed benefit which underlies the theory of a mechanic's claim, to be invoked as an equitable consideration to justify a decree compelling the bondholders to pay the demand of the appellee, which in no sense enured to their benefit.

In this view, the decree in effect declares the power of the company to create an indebtedness covering full six months of its operation, receive all the income, appropriate it otherwise, make default on its mortgages, and then compel its bondholders to pay all its operating debts. The first creditor is thus compelled to pay to the later creditor of his own debtor a liability incurred without his privity, and which in no way benefits him.

It is incredible that a court of equity should deliberately introduce such a wanton element of mischief into juris-

prudence, and give it effective and permanent application in dealing with these vast interests.

6. Grave considerations of public policy can be legitimately invoked to overthrow this ruling. The capital of the country is supremely interested in the subject.

Statistics indicate that over two thousand million dollars of railway bonds have been negotiated in this country and are now ontstanding. They are commercial securities of the very highest character.

On foreclosure no defense is admissible against the mortgage to secure them which could not be urged as a plea in an action directly on the bonds themselves.

The value of the bonds as an investment depends in a great measure on the extent and inviolable nature of the security, on the faith of which they were marketed. That security embraces the entire system of public works of this country.

It has been a consistent feature of our jurisprudence that the "rules of property" measuring the rights in land are substantially as fixed and definite in their operations as though they constituted the text of a precise statute.

To substitute for these wise and inflexible rules of property to which the negotiations of years have adjusted themselves, the doctrine that equity can exercise at its discretion the odious and clandestine power of dismantling a landed security and effecting a substantial repudiation of a commercial obligation, is "to seal a commission to a blank "of danger."

"The doctrine contended for would utterly destroy the marketable value of all corporate securities. No prudent man would ever buy a bond in the market if the provisions made for its ultimate redemption could be altered without his consent."

Vose v. *Bronson*, 6 Wall., 456.

It is a sound maxim that the system of law is best which confides as little as possible to the discretion of the judge.

Chancery procedure is subjected to rules as consistent and precise as those which distinguish the common law.

Although a chancellor might establish the precedent of this arbitrary and vague jurisdiction, while striving to administer a sentimental justice, in practice, habitual and intolerable abuses would accumulate.

The views of the different equity courts might not harmonize as to the limitations which ought to be observed in the exercise of this power of making discretionary awards out of the proceeds of a foreclosure sale. One, instead of arbitrarily ignoring the debts beyond six months, might recognize the paramount equity of all operating claims, whenever incurred; while another, on some fanciful but equally sound theory, might order the payment of borrowed money, or endorsed paper, or damages for personal injuries, until it would result that the first mortgage would be compelled to ransom itself from an undefined junior mass of liability, dependent not upon rule but on the uncertain humor of the particular tribunal.

"*Misera est servitus ubi jus est vagum aut incertum.*"

Lord BACON, observing against the vague or arbitrary exercise of judicial power, said that "he would take care "to contain the jurisdiction of the court within the ancient "mere-stones without removing the mark."

It will be found, upon consulting the precedents, that the decree overriding the elder mortgage by the junior debt, is in clear revolt against repeated and authoritative rulings of the courts.

There have been numerous instances where the contention has been made that exceptional cases of hardship or equity authorized a court of chancery to disregard the legal priority of the mortgages upon railways.

Uniformly, the response has been that no such power existed.

One of the earliest attempts to break down the clear pri-

ority of the bondholders was made in the foreclosure case of the Chicago, Alton & St. Louis Railroad in the Circuit Court of the United States for the Northern District of Illinois. A fund was in the registry arising from the sale of the road. Some supply creditors filed petitions to be paid out of the proceeds. In refusing their petitions, the Court said :

"These petioners have no specific lien, legal or equitable, upon this property. The fact that Spencer and Matteson and Litchfield agreed to pay them, did not create a specific lien. It may be conceded that, after the railroad came into the hands of Matteson and was run by him, when the parties who had liens upon the road were paid, that other parties might have an equitable lien upon the earnings of the road, but certainly they would have no right to be paid until prior incumbrances and liens have been satisfied. The fact that Matteson and Litchfield received the personal property cannot make any difference. They received it with the conveyance of real property, and these parties could not follow that personal property merely because Spencer or Matteson, or various other parties who may have had control of the company, owed them a debt.

"It may be admitted that if this road had remained in the hands of the receiver, and the parties for whose benefit he had been appointed had been paid, then these petitioners might have been entitled to receive from the proceeds in the hand of the receiver any surplus ; but what are the facts ?

"Here were large mortgages upon this railroad, which had become hopelessly insolvent. Application was made to the Court to put it in the hands of a receiver, in order that it might be operated for the payment of these mortgages. It was so done. It remained in the hands of the receiver for some years. Subsequently, other creditors applied to the Court, it being manifest that the mortgages could not be paid in that way, or at any rate that the time would be so long that it was desirable for the interests of all that the administration of the road should be changed. They asked the Court to order the property to be sold so that the parties in interest might realize upon their claims. It was accordingly sold, and the fund arising from the sale came under the control of the Court. Now what equitable lien had these petitioners on that fund ? None. Why ?

Because those who had prior liens came in and swept it away, and, more than that, have not, perhaps, been half paid. It is precisely like the case of a man who furnishes to the owner of a farm the means of carrying it on, but there is another party who has a lien upon that farm, and it is sold in order that the party who has the prior lien may be paid. Now, the fact that the mechanic or laborer has furnished the means of carrying on the farm would not authorize him to come into a Court of Equity and cut off the prior lien which exists on the farm, and prevent it from being paid.

"These parties ought to be paid. They have a just claim against this road. But it is against an insolvent corporation, and they ask parties who have a prior right and lien to pay them, because those with whom they have dealt cannot do so.

"Upon general principles, I hold what I have always held in all cases of this kind, that the party who has the prior lien is entitled to the preference, and this preference must prevail as against all, except specific liens, and these, of course, have to be paid in their order."

Denniston v. *C. A. & St. Louis R. R. Co.*,
4 Biss., 415.

An effort was made to compel a mortgagee in possession of a railway to specifically perform the executory contract of the mortgagor as to freight carriage, but the Court thus enforced the superior title of the encumbrancer:

"The contract of the petitioners confers no rights which attach by way of lien upon the property or franchises of the corporation. If it were otherwise, as it was made subsequent to and with full notice of the mortgage, it would be held subordinate to that incumbrance. Against the mortgagees or against the property of the corporation in their rightful possession, it could have no force, unless the mortgage by its terms reserved to the corporation the power to make contracts in respect to the conduct of its business which should be binding upon the mortgagees.

"To hold the mortgagees bound to render service without compensation on the ground of a contract therefor and prepayment to the mortgagors, would involve the right of the mortgagors to defeat entirely the security thus given, by depriving the property of its capacity to yield available income.

"The principle seems to us to be the same in the two cases. The mortgagee coming in by a superior title takes the subject of his mortgage clear of all obligations contracted by the mortgagor, whether personal to himself or relating to his management of the property. The right of the mortgagee is an absolute one. There is no contingency which would justify the Court in interfering to enable the petitioners to give security for the payment of such sum only as shall be found to be necessary for the payment of interest in arrear upon the bonds. The mortgagees are entitled to the whole property and all its income until payment has been made in fact. *Gooding* v. *Shea*, 103 Mass., 360. It is a legal right which cannot be limited; neither the equity nor the facts of the case warrant any such disposition of it."

Ellis v. *B. H. & Erie R. R.*, 107 Mass., 35 and 37.

In a recent foreclosure case in Alabama, a master reported in favor of paying certain corporate debts before the bonds.

In setting aside the report, Judge Woods said:

"The debt, which it is proposed to pay out of the income of the road, is a floating debt, partly secured by bonds, etc., inferior in rank to the great mass of bonds making up the bonded debt of the defendant company.

"The company has failed to pay the interest on these bonds having the superior lien, and for that reason the trustees of the first mortgage have taken possession of the road for the purpose, among others, of applying its income to the payment of the interest, and if there should be a surplus, to the principal of these bonds. The proposition is to apply, for the reasons stated, the income which the first mortgage bondholders are entitled to, to the payment of the floating debt.

"The fact that the floating debt was contracted in good faith, for the benefit of the railroad company's property, and therefore for the benefit of the bondholders, is true of perhaps all such debts. But that does not give the floating debt creditors any ground upon which to claim that their debt should be paid first.

Galveston R. R. Co. v. *Cowdrey*, 11 Wall., 482.

"But I do not understand that the floating debt creditors claim this application of the income of the road as a legal right.

"It stands simply on the ground that to refuse their payment would be inequitable. But I cannot invade the legal rights of others, to relieve the floating debt creditors from the position in which they have voluntarily placed themselves.

"The facts that a large amount of inferior securities of the railway company, now hypothecated for the floating debt, would be released by its payment, and that a reorganization of the company would be greatly facilitated and the valuable franchises of the company thereby preserved, by the proposed payment of the floating debt, are, doubtless, strong considerations, when addressed to the bondholders themselves. But can this Court waive the right of the bondholders, because we might think it would turn out to their advantage? Can we make a contract for them, because we think it would be a good contract? Have we the power to take the money which belongs to them, and give it to others without their consent, because we think it would be for their interest? They have not consented to this diversion of their money, and no one who is authorized to do so has consented for them. For the trustees to undertake to give assent for the bondholders is clearly outside of their powers and duties, which are plainly prescribed in the deed of trust.

"The Court is, in my judgment, without any power to make the decree recommended by the report. To undertake to do it would be to invade the legal rights of the bondholders, and if established, as within the power of a Court of Equity, would shake the credit of railroad securities throughout the world.

"I must, therefore, decline to adopt the recommendations of the Master."

Duncan v. *Mobile & Ohio R. R.*, 2 Woods, 545.

The Supreme Court of Ohio declined to subvert the mortgage security on application of a creditor who claimed a preference on a debt due him for money advanced to pay taxes on the railway, for bond interest and right of way.

It was said by it:

"It appears that the consideration of the debts for which

the defendant, Hilliard, recovered a judgment was for moneys advanced in payment of interest and taxes, and for right of way. This, it has been suggested, gives him an equitable claim, as against the mortgagees. We have already adverted to the peculiar position in which the nature and character of the mortgages place the directors of the company and the mortgagees. The directors acquire property for the use of the road; this may be done from the earnings of the road, with money borrowed, or upon a credit.

"We are not inclined to exempt the company or the mortgagees from the application of any rule of law which would properly apply to the dealings between them, or to the property which is the subject of these dealings, and which would secure or protect the just claims of third persons. But we are bound to respect the claims of the mortgagees, and do not feel authorized to modify the settled rules of law which govern the dealings of third persons with the directors of the company, so as to impair that security which the mortgagees, under the terms of a contract authorized by law have obtained. It is possible particular cases may arise, which, owing to the peculiar relation between the directors of the company and the mortgagees as to the use and disposition of the property, and increase, may present equitable considerations calling for relief. But we need not discuss or conjecture the character of such cases. It is sufficient to say that none of the claims in this case present such considerations."

Coe v. *The Columbus, Piqua & Indiana R. R. Co.*, 10 Ohio, S. 404.

An action was brought by a contractor, claiming that an agreement for a charge upon the moneys arising from the sale of mortgage bonds entitled him to a preference over the bonds in case the fund was not so appropriated, because his work had largely created the mortgage security.

The claim for priority was rejected, the Court deciding:

"Nor was it in the power of the corporation and the trustees combined to create a charge or lien on the property covered by the mortgage, which would take precedence of that of the trustees of the bondholders, which by the express declaration of the indenture itself, was to be

the 'first and only lien on the property and franchises of the company.' The bondholders advanced their money upon the faith of the security in the existing property and value of the road and its appurtenances, and the property and value to be added by the expenditure of money advanced by them.

"As no property had been acquired under the mortgage except such as by its terms was to be subject to the first and only lien, under the mortgage, in favor of the bondholders. The 'charge' in favor of complainant, if any agreement for such charge had been made, and if such agreement had been assented to by the trustees, would have been subordinate to the first lien created by the indenture. The advances made by the bondholders were made upon the faith of such security, and the fact that complainant's labors had added to the security of the bondholders, would not subordinate their lien to his, if he had one."

Dillon v. *Barnard*, 1 Holmes, 394.

This case is in precise accord with two decisions of this Court.

In the earliest cause, Walker had actually constructed the greater portion of railway with his own means, under an agreement that he was to remain in possession, and receive all the earnings until he was fully paid. Prior to his contract and work there was a recorded mortgage on the projected road, although but little work had been done.

Dunham v. *Railway Co.*, 1 Wall., 268.

In the later case of the *Galveston Railroad* v. *Cowdrey*, 11 Wall., 482, the precise doctrine of natural equity which will be pressed into the service of sustaining this decree, was strongly urged.

A part of the road was laid with iron belonging to Pulsford. An elaborate argument was presented by his counsel, based on analogies from the civil and maritime law, and claiming priority because his capital applied to the road had conserved it and rendered it capable of being operated.

The Court declined to adopt the principle.

" All that it is necessary to say is that the rule referred to has never been introduced into our laws, except in maritime cases, which stand on a particular reason.

" By the common law it is an inflexible rule that whatever is affixed to the freehold becomes a part of the realty, except certain fixtures erected by tenants, which do not affect the question here. The rails put down on the company's road became a part of the road. The road itself was included in the mortgages of the complainants. Pulsford, by allowing his property to go into or become part of the road, consented to its being covered by the mortgages in question.

" He acquired no lien which can displace them. In certain States a lien is created by statute in favor of mechanics, called the mechanics' lien, by which a person furnishing materials or work on a building acquires a lien on the property to secure the payment of his claim. But this kind of lien did not exist in Texas in favor of those who supplied materials or money for constructing railroads. We have no hesitation is saying that Pulsford's claim to priority cannot be maintained."

The Supreme Court of Iowa have reached the same conclusion as to the respective rights of railway mortgagees and creditors furnishing current supplies for the operation of a completed road.

" The plaintiffs are affected with knowledge of the existence of the mortgage, and seeing that the road had mortgaged all its future acquisitions, they could and should have protected themselves by refusing to sell the ties without payment or security.

" It surely cannot be claimed that the plaintiffs, in virtue of their lien, are in any better position than would be a second mortgagee of the road. Could such mortgagee claim priority over a holder of a bond, secured by the first mortgage, but not negotiated until after the second mortgage was issued? It seems to us that to such person it would be said: 'You saw the record of the prior mortgage—knew what it was given to secure; you voluntarily advanced your money subject to the prior encumbrance, and you cannot now be preferred to any part of it.'

" Wherever the acquisition becomes so attached to the principal thing as to become a part of it, the prior mortgage fastens to it, and the lien of the mechanic or ma-

terial man is postponed to that of the mortgagee. This is the result of the decision in 11 Wall., 459, and of our own decisions in *Getchell* v. *Allen*, *supra*, and they are, it seems to us, based upon the soundest principles of law and reason."

Nelson v. *Iowa Eastern R'y Co.*, 2 C. L. J., 741.

This same view was enforced by Circuit Judge Dillon in the foreclosure case of the Burlington, Cedar Rapids & Minn. Railway, after the most elaborate examination. He thus announced the rule:

"Where there is a prior lien on the building or railway, these once having been completed, and a mechanic subsequently does work or furnishes materials, he has a lien; but a lien subordinate to the mortgage, and which must be enforced as such, and it is accompanied with no right of removal.

"When does such lien attach, and how is it to be enforced? As against the owner the lien attaches from the time the repairs are begun. This is plain enough and just. But how does this lien attach as against a prior mortgage of land and building? The answer is, at the same time it attaches as against the owner. The result is that repairs on a previously completed building or railway on which a mortgage rested prior to the commencement of such repairs, do not give a lien which will override the lien of the mortgage. The legislature has not authorized the owner of a building or railway, on which such owner has given a mortgage, to improve the mortgagee out of existence, by making repairs *ad libitum*, and furnishing the owner the necessary credit therefor, by giving the mechanic and material men a lien paramount to the mortgage. Such a view has neither law, justice, equity or public policy to recommend it."

Taylor v. *B., C. R. & M. R'y.*, 9 C. Legal News 329.

These precedents serve to establish that the ruling below was contrary, not only to fundamental legal principles, but also to the universal practice of the courts.

These authorities are controlling. The decree below falls clearly within the principle they enforce. No matter

in what particular guise these alleged superior equities have sought recognition, the courts have with entire accord refused to abrogate the plain and rigid rules whereby the rights of mortgagees are established.

It is not difficult to perceive that the adoption of any obscure and shifting boundaries in their stead is a judicial experiment which will be attended with disaster to all the interests involved.

II.

SCHALL CANNOT LAWFULLY RECOVER POSSESSION OF THE CARS, NOR COMPENSATION FOR THEIR USE BY A RECEIVER, IN THE FORECLOSURE SUIT, BECAUSE THE TRUST DEED OF 1869 BECAME A SUBSISTING AND PARAMOUNT LIEN THEREON, AS SOON AS THE CARS WERE PURCHASED BY AND DELIVERED TO THE RAILROAD COMPANY, AND THE WRITTEN CONTRACT UNDER WHICH SCHALL CLAIMS TITLE IS VOID AS AGAINST THE APPELLANTS, UNDER THE LAWS OF ILLINOIS

Schall's title is based on the paper contract of 1873. It declares the "cars are sold this day," etc. The price is fixed and time and place of delivery. Of the contract price $44,323.43 had been paid, and the cars had been in the possession and use of the corporation for nearly two years when the foreclosure action was instituted.

If this constituted the whole transaction, it could hardly be contended that the vendor could resume title at the expiration of four years after completed sale, delivery and partial payment.

Reliance is made to support the claim of title on that part of the agreement which declares, "cars to remain "the property of Michael Schall until paid for."

It is an undisputed fact that this contract was never acknowledged or recorded in any manner.

It is also clear that from the date of the original sale in

1873 to the present time, Schall has never retaken possession of the cars.

On these facts can he recover the title as against the mortgagees?

When the foreclosure action was begun all these cars were on the line of railway, constituting a part of its regular equipment.

The mortgage in explicit terms embraced all cars, engines, etc., of every nature and kind whatever, including all that it might thereafter acquire either in law or equity.

When this mortgage was executed in 1869, this species of conveyance had received an explicit and definite interpretation by the Court.

It was held that such an encumbrance was precisely as effectual to cover and bind after acquired equipment, as though it had all been in existence when the mortgage was delivered.

Such is the doctrine repeatedly announced by this Court: "A mortgage of a railroad company which covers, in the terms of the mortgage, its engines, cars, and machinery, carries not only those in existence at the date of the mortgage, but such as take their place, or are subsequently added to them by the company, and exist at the time of the foreclosure."

Pennock v. *Coe*, 23 How., 117.
Minn. Co. v. *St. Paul*, 2 Wall., 635.
Putnam v. *Bill*, Oct. Term, 1877.
Galveston R. R. v. *Cowdrey*, 11 Wall., 483.

The Supreme Court of Illinois, in *Palmer* v. *Forbes*, 32 Ill., 248, announced the same view, holding that engines and cars were in the nature of chattels real, and whenever they came into the possession of the company by purchase, became immediately subject to the mortgage.

This construction of the mortgage was, therefore, at its date, a fixed rule of property.

Besides this judicial interpretation, the charter had ex-

pressly authorized it to mortgage any of its property to be thereafter acquired.

The mortgage creditors, having this indisputable lien upon these cars purchased from Schall by the corporation, delivered into its possession and partly paid for, procured the appointment of the receiver.

As it has been before remarked, this was equivalent to an actual entry of possession by the mortgagee.

Boyd v. *Burke*, 8 Irish Eq., 660.
Mass. Hosp. Life Ins. Co. v. *Wilson*, 10 Met., 126.
Am. Bridge Co. v. *Heidelback*, 4 Otto, 800.
Howell v. *Ripley*, 10 Paige, 43.
Astor v. *Turner*, 11 Paige, 436.
Coe v. *C. P. & I. R. R.*, 10 Ohio S., 404.
Noyes v. *Rich*, 52 Maine, 116.

The bondholders' title to the cars is based on the fact that they are described in the mortgage, and that their lien has been still further ripened and enforced by an actual possession taken in their interest.

Can the intervening petitioner overthrow this mortgage and possession, and recover title to the cars?

His contract sells the cars to the company. That sale is perfected by actual delivery. Part payment is made. The title is attempted to be retained in the vendor, but solely by way of security for the unpaid portion of the contract price.

Schall had no right of possession, use, or disposition thereof, and the risk of the property was with the railway.

The exact legal character of the contract is thus defined by the Supreme Court of Illinois:

"It was a conditional sale, with a right of rescission on the part of the vendor, in case the purchaser should fail in payment of his installments. A contract legal and valid as between the parties, but made with the risk on the part of the vendor, of losing his lien in case the property should

be levied upon by creditors of the purchaser while in possession of the latter."

March v. *Wright*, 46 Ill., 488.

The transaction is precisely as though the petitioner had executed a formal bill of sale for the cars, and taken back an unrecorded chattel mortgage for the credit payments.

The contract reserving this lien was never acknowledged or recorded, and the term of credit was for three years.

By the express term of the statutes of Illinois, this writing "having the effect of a lien" upon the cars, is invalid as against "the rights and interests" of the bondholders in actual possession under their specific lien, for three reasons:

1. It is not acknowledged before the officer required by the act.

2. It was never recorded.

3. The credit was longer than the limited term of two years, and the petitioner made no attempt to enforce his claim of lien until about three years from the date of the original car delivery.

Ill. Stat. (1874), Secs. 1 and 3, pp. 711, 712.

Schall is prevented by the prohibition of the statute from using the paper as a muniment of title. At common law, delivery is conclusive evidence of a completed sale.

As against the bondholders, the secret paper is wholly unavailing and void. It cannot be introduced to contradict the conclusive evidence of the company's title, as shown by its continued and exclusive possession and enjoyment of the cars.

Although the bondholders or trustees might be fully charged with actual notice of the existence of the paper, it is nevertheless of no validity, because the statute distinctly makes it wholly void, irrespective of notice.

The invalidity of such an unrecorded and unacknowledged contract for a lien is settled by a long and thoroughly consistent line of decisions of the Supreme Court of Illinois interpreting the statute.

Ketcham v. *Watson*, 24 Ill., 591.
Forest v. *Finkham*, 29 Ill., 141.
McCormick v. *Hadden*, 37 Ill., 371.
Sage v. *Browning*, 51 Ill., 217.
Frank v. *Miner*, 50 Ill., 445.

The whole subject has been recently adjudged by this Court in a case where a manufacturer, by a written contract, sold an engine, delivering possession, but reserving title until the purchase price, which was placed in the guise of rent, should be paid.

The judgment on the validity of the transaction was:

"The policy of the law of Illinois will not permit the owner of personal property to sell it, either absolutely or conditionally, and still continue in possession of it. Possession is one of the strongest evidences of title to this class of property, and cannot be rightfully separated from the title, except in the manner pointed out by statute. The courts of Illinois say that to suffer without notice to the world, the real ownership to be in one person, and the ostensible ownership in another, gives a false credit to the latter, and in this way works an injury to third persons. Accordingly the actual owner of personal property, creating an interest in another, to whom it is delivered, if desirous of preserving a lien on it, must comply with the provisions of the chattel mortgage act.

"R. S. Ill., 1874, 711, 712. It requires that the instrument of conveyance, if it have the effect to preserve a mortgage or lien upon the property, must be recorded, whether the party to it be a resident or non-resident of the State.

"If this be not done, the instrument, so far as third persons are concerned, has no validity.

"Secret liens which treat the vendor of personal property who has delivered possession of it to the purchaser, as the owner until the payment of the purchase money, cannot be maintained in Illinois.

"They are held to be constructively fraudulent as to

creditors, and the property, so far as their rights are concerned, is considered as belonging to the purchaser holding the possession."

Hervey v. *R. I. Locomotive Works*, 3 Otto, 672.

For these reasons the decree of the Circuit Court ought not to stand.

The right of the bond creditors to the sale proceeds of the property mortgaged to them, whatever theory of car ownership be true, must suffice to reverse the money decree awarded against the fund.

The order declaring title in Schall cannot be affirmed without giving effect to a paper which the statute expressly declared shall be void.

HENRY CRAWFORD,
Solicitor for Appellants.

JAN., 1878.

APPELLANT'S REPLY,

AND

SUGGESTIONS AS TO THE ADDITIONAL RECORD.

It was stated from the bench when application was made for the *certiorari*, that all questions as to the admissibility or weight of the new matter would be considered on the final hearing.

The arguments of opposing counsel have been to a considerable degree based on the transcript returned under the *certiorari*.

They contain also a number of serious misrepresentations as to the legal proceedings in the Circuit Court which, unless corrected, might possibly work injury to the appellants' interest.

These suggestions are filed, therefore, mainly to object to the consideration of any of the matter returned under the writ, and to correct these misrepresentations.

A formal motion has been filed to reject the additional transcript.

As the three causes—Nos. 940, 1,029 and 1,030—are substantially submitted together, what is said herein will apply to each case.

1. The additional transcript returned by the clerk of the Circuit Court contains, from pages 1 to 58, inclusive, *portions* of the record in an equity suit of Stephen Osgood against this railway company. These portions, according to the return of the clerk, he embraces, because directed by the counsel for the intervening petitioners. (Add. Record, p. 58.)

The record shows the Osgood case was a separate suit, brought originally in the State Court. The parties are

not the same as in the Fosdick case. None of the appellees are parties, nor have they ever intervened in that cause. It does not appear that any final decree has been reached therein.

The Circuit Court refused to consolidate that cause with the main foreclosure suit, (Add. Record, p. 58,) and they have proceeded separately.

The two causes being distinct, the culled portions of the record of the Osgood case have no legitimate place in the transcript on this appeal. The Court ought, therefore, to decline considering them, and tax the costs thereof against the appellee.

Counsel states in his brief, (page 4,) that it will appear that the receivers appointed by the State Court paid for supplies and other necessaries for the actual working of the road.

If this is designed (as it apparently is) to create the impression that the State Court receivers paid any *corporate* liabilities for supplies, the statement is wholly unsupported by the record, or the actual facts.

Their reports appear on pp. 56, 57 of the Add. Record, and show they disbursed only for *receivers'* operating expenses.

2. The remaining matters of the additional transcript, from pages 59 to 77, pertain to the foreclosure action.

No necessity or propriety existed for embracing the original bill of February 27th, 1875, in the new transcript. It had been superseded by the filing of a new supplemental and amended bill, which was a complete pleading, and on which issue was joined and decree based. The latter with all its exhibits is set out at large in the appellant's original transcript, and sufficed to present every question involved in this appeal.

Attention is called to the certificate of the clerk support-

ing those items of the Add. Record, from p. 65 to 77 inclusive.

He does not certify them to be full, true and correct transcripts of the record, but that they are transcripts of "*drafts or memoranda, with all their indorsements thereon, "from which* the orders were entered of record," &c. (Add. Record, p. 77.)

Such a certificate is unknown both to the statute and the practice of the court.

"Drafts or memoranda," from which orders are entered, constitute no part of the record; still less do "endorsements" on such papers.

The law defines what makes up the record in an equity cause, and the clerk can only certify these.

R. S., §§ 698, 750. Rule 8th, 3d Clause.

The original transcript filed by the appellants was a liberal compliance with the rules of this court. It contained every pleading, exhibit, deposition or entry which could possibly be necessary to a complete understanding and correct decision of the questions at issue between the adversary parties on these appeals.

Obviously this alien matter is sought to be brought into the record for no other reason than to furnish apparent support for the statement found on page 6 of appellee's brief:

"Most all the allowances made by the court for this "and kindred claims, were acquiesced in by all the parties "and counsel concerned, and many of the orders. Cer- "tainly this one, *originally*, was entered by consent, and "the motion to set aside this allowance was an after- "thought consequent upon the near conclusion of the "powers of the court."

In the briefs, in Nos. 1029, 1030 (page 5), similar language is employed as to consent orders, with the broader observation, "*no resistance being made to any of them until*

"*it was apparent that the powers of the Circuit Court* "*were nearing a conclusion.*"

In support of this statement, appellee calls attention of the court to a list of claims asserted to be those paid by consent.

No pretense is made that the particular decrees appealed from were by consent. The record shows they were not. The counsel seek to invent a new legal position. Notwithstanding these allowances were contested, and the bondholders insisted upon their priority at every step, it is argued because they have acquiesced in the allowance of what are described as kindred claims, this appeal must fail.

This court of last resort, discarding the actual adversary state of the record, is, in effect, asked to decree the specific performance of some pretended, vague, "tacit understand- "ing had by the court, parties and counsel" as to the payment of floating debt claims.

Certainly, as a legal proposition, absurdity could not go further. This appeal must be decided according to the issue actually involved.

But apart from its legal insufficiency, the appellants challenge the statement, which is made on the basis of these "drafts or memoranda," culled under the direction of the counsel, as uncandid and unwarranted by the record.

Statement. "Most all the allowances made by the Court "for *this* and *kindred* claims were acquiesced in *by all* the "parties and counsel concerned," &c.

Correction. To pretend that the bondholders ever acquiesced in either of these three allowances appealed from, is to boldly disregard the record.

In the Schall and S. W. Car Co. cases, instead of acquiescing, answers to the intervening petitions denying the claims of the petitioners, and insisting on the title and pri-

ority of the bondholders, were filed *on the very day* the petitions were presented.

Record Schall Case, p. 75.
Record S. W. Car Co. case, p. 80.

In the petition of the Hinckley L. Co. Works, (Orig. Record, p. 72), no claim was made of *lien* on the fund, or priority over the bonds, nor was there any prayer for the receiver to pay any money whatever. The only prayer and the reference was to ascertain the *balance due from the Co. under the contract, by the terms thereof.* (p. 73.)

On all the claims, as soon as any attempt was made to pay them out of the fund before payment of the bonds, there were prompt exceptions and resistance.

Hinckley case, Orig. Rec., p. 121.
S. W. Car case, Rec., p. 105.
Schall case, Rec., p. 100.

That will suffice for the pretense that there was any acquiescence in the allowance of *these* claims.

Statement. "Allowances for *kindred* claims were acqui-"esced in by all the parties and counsel concerned." It is in support of this, that attention is called to the list of "claims paid by consent."

Correction. This is undeniably intended to create the impression, that the additional record exhibits nothing except "consent" allowances of claims, which are "kindred" to these appealed from.

If the inquiry were pertinent, the only legitimate and fair method of advising this court judicially, of the exact nature of the allowances, and whether they were "kindred" claims, would have been to incorporate in the record the several petitions, answers, evidence and master's reports, on which the allowances were based. But all these have been cautiously withheld, and nothing presented here save counsel's draft of final allowances wrenched from their context. This court has, therefore, solely, the counsel's

statement that all these are consent allowances of kindred claims.

If he had taken any pains to inform himself of the exact nature of the demands thus sought to do duty as kindred claims, he would have found that nearly the entire list is made up of demands allowed upon wholly different grounds. Phelps (Add. Record, p. 69) was paid for attorney's services in the Osgood case. Ranney for money due, him on receivership account (Rec. p. 70), while Hubbard, Simons, Walker, Parker, Nolan, Williams & Thompson, Block, Carpenter, Smith, Townsend, Fierstein, Shelby, Mallory and Dow, had allowances either for the rent or purchase money of real estate, necessary for the railway, actually used by the receiver, and to which the several petitioners had title.

Rolle, Junker & Co. claim was an adjustment with large shippers for freight advances on an executory shipping contract adopted by the receiver. (Record, p. 68).

The order copied in (Add. Record, p. 86), as to William Adams, was not made by consent. It does not so indicate. It was made *ex parte* on the application of the receiver, without notice indicated to any of the litigants, and long before the appellants had intervened in the cause.

It is true that the claims of Kelly and others, shown on page 67 of the Add. Record, were *kindred* claims, but the exact reliance to be reposed in the statement that they were consent allowances, or that "no resistance was made "to any of them until it was apparent that the powers of "the Circuit Court were nearing a conclusion," (Brief, p. 5), can be best appreciated by the last item of the additional transcript which the counsel opposed going into the return (Add. Record, p. 78).

That shows that the bondholders, within less than four months from the time the Federal Court receiver took possession, filed formal objections to the allowance of these

very claims of Kelly, Hess, English and others, and the allowances made were in every sense adversary proceedings, as shown by the entry (p. 67).

The exact truth is, that the culled claims which are consented to, are not "kindred" with these in controversy, and the record shows the kindred claims were not acquiesced in, but were contested.

Statement. "This case is brought here, it will be observed, by the vendees or purchasers at the sale," which is "an important fact to be borne in mind in the subsequent examination of the case, because whatever the rights of Fosdick & Fish, the trustees, may have been, it does not follow that the vendees succeeded to all of them." (Brief, p. 5.)

This is repeated in each of the briefs.

Correction. The records all show:

That the exceptions were filed by the intervening bondholders.

That they appeared in the master's office, and contested the orders for payment, and finally, that the appeals were prayed by, and allowed to, the *intervening bondholders.*

Record, Hinckley, p. 126.
" S. W. Car Co., p. 107.
" Schall, p. 101.

The vendees at the sale have never taken any appeal whatever, and we presume it is an important fact to note that the rights of the actual bondholders are, in equity, quite as ample as those of the trustees who are mere stakeholders of the trust property.

Statement. "The opposition *now* made is in gross violation of the tacit understanding had by the Court, parties and counsel, that if this road was to be held by receivers, and the power of the court invoked to run and manage it for the bondholders, these claims incurred for their benefit and in their interest were to be paid."

Correction. This is a clumsy fiction devised to answer the exigencies of a failing cause.

Who were the *other* contracting parties who entered into a "tacit understanding" with a court of justice as to how the anticipated revenues of a railway should be disbursed?

Did the trustees make this compact; and if so, how and when? If the bondholders' rights were, and are paramount, what possible commission did the trustees possess to barter them away by some tacit understanding with a court, or any one else? These bondholders did not intervene in the cause until long after the appointment of a receiver by the Federal Court, and there can be no truthful claim that they had any tacit, or other understanding whatever, on the faith of which the receiver was appointed.

The record very effectually disposes of this claim of a tacit understanding as to this class of demands.

The bill prayed the appointment of a receiver. In granting it, the Court fixed no judicial toll, as the price of doing what was his clear judicial duty to do when an admitted case of a defaulted mortgage, inadequate security, and insolvency of the mortgagor, was made out.

If, then, there was any such court compact, why does not the order appointing a receiver recite that the earnings were to be applied to the payment of floating debt, as a preferred claim? It does not. (Record, p. 1.)

Yet it would be the greatest folly to advance as a chief reason for the allowance of a large sum that, although the law would not ordinarily justify it, there was some tacit understanding with the court that, in such instances, the law must be put aside.

Why, if there was a tacit understanding of the character stated, did the amended bill charge, (page 4,) and the answer concede that the mortgage was a first lien on the whole property, (p. 64), and why did the court entertain the

bondholders' petition, and answers to their petitions, and exceptions to their allowances, distinctly raising the same questions which we now ask this Court to decide, as to the priority of their mortgage lien ?

Why, if there was such a tacit understanding originally, was it not brought upon the record and reduced to certainty by some paper or affidavit evidencing its existence, after the claimed violations thereof had begun as early as September, 1875 ?

Why, if there was such a tacit understanding, waiving the bondholders' rights, did the court hear and decide the allowances " on the merits," as shown by its own order ? (Hinckley, Record, p. 126.)

The position of the bondholders is very clear and strong. Their rights rest on written and recorded muniments. They did not give them away by any understanding, tacit or otherwise, and the trustees had no lawful power to do so.

A " tacit understanding " on this subject implies that, without it, the rule as to payment of this class of claims would be different, but the very extract cited in the brief from the opinion of the Circuit Judge, (p. 19,) shows that, instead of these allowances resting on the unsatisfactory basis of a tacit understanding covering their payment, he has, on a full examination of their equities, decreed their payment as a legal right.

Thus :

" As I stated during the argument, we have adopted a " rule in this State which has the advantage of being *a* " *fixed and permanent rule.*"

" I do not feel inclined to *depart from* the PRACTICE " *which has been* ESTABLISHED. It does allow the employ- " ing of persons who have done work, and persons who " have furnished supplies and material, a compensation for

" all that has been done, and all the supplies that have been " furnished within a reasonable time."

The allowances below were made on the theory of that " fixed and permanent rule," that " established practice," from which the Circuit Judge, on full examination, declared he would not depart.

The merit and lawfulness of that " fixed rule " and " established practice " are fairly before this Court for its review, and we have the right to demand a decision on that issue.

These appeals are, in fact, test cases, which involve the principle of a considerable number of such allowances which will not admit of separate appeals, in consequence of the amount being below $5,000.

In the brief in Nos. 1,029, 1,030, occurs the

Statement, " so far as this record is concerned, there is no " evidence that Fosdick and Fish, the complainants in the " main case, ever *sought* or prayed an appeal, not having " joined in the bond." (Page 5).

Correction. The point is somewhat immaterial whether they did or not, as certainly the bondholders would be entitled to the use of the trustees' names if necessary; but in these instances it so happens the record distinctly shows that the trustees joined in the exceptions and in the appeal.

Record S. W. Car Co., p. 104.
" Schall, pp. 100, 101.

Statement. " This, it will be observed, was not a pay- " ment for locomotives, nor was it a payment in any way " *made under* or *by virtue of any existing contracts* for the " purchase of locomotives, but was," &c. (Brief, p. 9).

Correction. The allowance could only be justified by the allegations and prayer of some petition.

The only petition filed is at page 72 of the Orig. Record.

After stating the contracts with the railroad company, the petition prays "that the said *contracts* and notes be re- "ferred to the Master in Chancery of this court to ascer- "tain the balance due your petitioners from the said road, "and that the said Master be directed to hear the testi- "mony in relation thereto, and to *ascertain the balance due* "*under such contracts* from the said company to your peti- "tioner." The contracts are attached as exhibits.

"The reference ordered the Master to report as to the "balance for which the said road is liable, *by virtue of said* "*contracts under the terms thereof*." (Orig. Record, p. 73.

The Master reported an amount based on fifty per cent. of the original *contract price* as a compromise settlement of the claim. (Orig. Record, p. 100.)

This petition, report, and attached evidence, furnishes the only basis for the allowance which it is stated is *not* a payment in any way made under or by virtue of any contract for engine purchase.

Statement. "Appellee's locomotives drew their trains, "and brought in their freight charges and passenger fares. "Without them, their road was useless and valueless, and "destitute of revenue."

Correction. Anderson, receiver, swears that the engines were unsuitable, and not valuable for use on the road, and that constituted one of the reasons why he surrendered them early in his receivership. (Orig. Record, p. 105.)

The brief (p. 16) makes the further

Statement. That the court found that each of the Schall cars, when delivered to the railroad company, was marked, "this car is the property of Michael Schall, York, Penn."

On this quite an argument is based to the effect that this was notice of Schall's title.

Correction. This so-called finding of the court has no

evidence, exhibit, or paper whatever to support it; absolutely nothing.

The original petition does not claim it. (Record, p. 74.)

The contract does not show it, but that the cars are to be lettered and numbered as per direction of the general manager. (Record, p. 99.)

The evidence of the only witness, Anderson, does not indicate it; neither does the Master's report. (Record, pp. 94–99.)

The receiver testified the cars were part of the regular equipment; were worth about $300 to $320 each, and $197.00 had been paid on each. (Report, p. 99.)

The claim that the *vendees* cannot hold the cars because not embraced in the schedule of property sold, is pointless, because on this appeal the court is asked to adjudge the rights and liens of the *bondholders*, whether the personalty in dispute has, or has not been sold by the Master.

If it is not sold, the mortgage lien will hold it as against the appellee, if the bondholders' claim to priority be well founded. Nor could any *ex parte* act of the Receiver, such as dealing with Schall as owner, or paying rent, be of any weight in concluding the appellants' rights.

The third paragraph of the argument justifying the decree below under the clause of the trust deed specifying what payment the trustees in possession should make, is sound in law, but bad in application.

The mortgage trustees in possession could only deduct for operating expenses incurred by them while in possession. Likewise the Receiver.

The claim of appellee, not being for expenses incurred by the receivership, ought not to have been given priority out of the fund.

The brief claims that under the new constitution of 1870, the trust mortgage is a nullity, for lack of proper acknowledgment. That while the mortgage is a first lien

on the real estate, appellee had first lien on the personalty, especially such as was acquired after the adoption of the Illinois constitution, in 1870.

All this fine drawn distinction is an afterthought. If any such thing had been relied on, the petition of intervention should have claimed the right to an allowance out of the sale of personalty, separately made, and had that fund marshaled not simply to pay the petitioners' claim, but all other labor and supply claims similarly situated.

There is no allegation or proof on which to base this distinction, and avoid a reversal. The petition does not claim a lien on the rolling stock alone, nor was any testimony taken as to the value or existence of equipment acquired after 1870. The facts shown by the record will not, therefore, avail the theory. The bill claims that the mortgage is a first lien *on all the property, real and personal*; the answer admits it, the decree finds and adjudges it. On this decree no errors are assigned by appellee. The validity and scope of the mortgage are, therefore *res judicata*.

But the legal proposition is monstrous. The trust deed was executed and the bonds were sold in open market long before the new constitution. The charter of the company authorized it to borrow money, issue bonds, and secure the payment of the same by a mortgage covering all the property of the company "*then existing or thereafter to be acquired*." As to that company this chartered power palpably emancipated the one mortgage which might be executed on both real and personal property from the operation of the chattel mortgage law. That required a "schedule" of the personalty to be attached. That was impossible in case of *after acquired* personalty.

But at the date of this mortgage, the Supreme Court of Illinois had given a fixed construction to such mortgages.

Rolling stock was declared not to be personalty, but in the nature of fixtures, and covered, no matter when acquired, by a mortgage of the railway then made, and to be made.

Palmer v. *Forbes*, 23 Ill., 248.

Such was the settled law of this Court, and of other States, without exception.

The constitutional provision quoted was prospective in its nature and operation, and can only apply *to mortgages executed after its adoption.*

The attempt to invoke this later law to limit the security and impair the obligation of the mortgage contract, notwithstanding it was clearly valid and exhaustive in its scope when it was executed, would be to give the section a construction which would make it unconstitutional.

Ohio L. Ins. & T. Co. v. *Debolt*, 16 How., 432.

Gelpecke v. *Dubuque*, 1 Wall., 206.

The scope of our mortgage must be adjudged by the charter, and the judicial decisions at the date when it was delivered.

According to *Palmer* v. *Forbes*, and the universal current of authority, it was a security precisely as valid and effective upon all engines and cars acquired after its delivery as those then actually covered, and this result reached wholly independent of the chattel mortgage law.

Before any attempt was made by the intervening petitioners to enforce any pretended claim of lien on their behalf, all this property owned by the corporation on February 27, 1875, was reduced to possession by the actual appointment of a receiver, on a bill to foreclose, claiming a first lien on all the equipment.

Whatever fault in a mortgage acknowledgment, the re-

duction to possession is tantamount to a complete investiture of title.

Hunt v. *Bullock*, 23 Ill., 264.
Atkins v. *Burns*, 71 Ill., 326.

HENRY CRAWFORD,
Solicitor for Appellants.

IN THE

Supreme Court of the United States,

OF OCTOBER TERM, A. D. 1877. No. 1,030.

WILLIAM R. FOSDICK, ET AL., *Appellants,*
v.
MICHAEL SCHALL, *Appellee.*

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF OF APPELLEE.

R. BIDDLE ROBERTS,
SOLICITOR.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET.
1878.

That portion of the record which I have denominated "Additional Record," brought here by virtue of the **certiorari** *ordered by this Court on the 4th inst., not having been printed before the time at which I was compelled to file my Brief, I have had necessarily to refer to the paging of the "Original," and beg to make this apology to the Court.*

R. BIDDLE ROBERTS.

Feb. 23d, 1878.

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Statement of Case for Appellee.

It is true that the Chicago, Danville and Vincennes Railroad Company was chartered as stated in the appellants' brief, and that it did borrow money substantially as stated, and that there was a foreclosure of the mortgage. It is true that the bill was filed on the 27th day of February, 1875, in the Circuit Court of the United States for the Northern District of Illinois; but it is also true that Stephen Osgood, a bondholder, had prior to that, filed a Bill in Chancery in the Circuit Court of Will County, in the State of Illinois, and that Brown & Hammond had been appointed Receivers, and that they took possession of the Railroad on the 22d day of February, 1875, and held it by virtue of that proceeding until the appointment of General Anderson, in the Fish and Fosdick case, in the Circuit Court of the United States, who relieved Messrs. Brown and Hammond on the first of June, 1875.

That portion of the Record which has been brought here by virtue of a *certiorari* issued by this Court, will show that the Osgood case was the one in which Receivers were first appointed; that that case was removed into the Circuit Court of the United States for the Northern District of Illinois on the application of the respondents,

Additional Record, p. , filed in No. 940 present term.

and that a motion was subsequently made to consolidate that case with the case of Fosdick and Fish, the trustees, which motion was refused, but the said Osgood was permitted to intervene, and did intervene, in the Fosdick and Fish case.

Printed Record, p. 67.

It will further appear, that by virtue of the removal of the cause to the Circuit Court of the United States, that Brown and Hammond, the Receivers appointed by the Circuit Court of Will County, Illinois, made their final Reports to the Circuit Court of the United States in the Osgood case, paying for supplies and other necessaries for the actual working of the Road under the direction of the Court.

Additional Record, p. , filed in No. 940 present term,

and were succeeded, as has been stated, by General Anderson, the Receiver appointed by the United States Court in the Fosdick and Fish case.

The road was, therefore, in the hands of Receivers, on the application of Bondholders and Bondholders' trustees, from the 22d of February, 1875, until the time of the sale and delivery to the purchasers, April 17th, 1877. Thus, from the 22d day of February, 1875, to the 1st of June, 1875, held by Brown and Hammond, the Receivers in the Osgood case.

Additional Record, p. , filed in No. 940 present term,

and from the 1st of June, 1875, to the 17th of April, 1877, held by General Anderson, the Receiver appointed in the Fosdick and Fish case.

Printed Record, p. 1.

Although General Anderson's appointment was made on the 20th of May, 1875, he did not give bail, or actually relieve Brown and Hammond until the 1st of June, 1875.

The case of Fosdick and Fish against the road, in which the appellees in this case are intervenors, and in which case the decree of sale was had, has not been appealed from, and therefore, the main case is not in this court; and so far as this record is concerned, there is no evidence that Fosdick and Fish, the complainants in the main action, ever sought or prayed an appeal, not having joined in the Bond.

Printed Record, page 102.

And this case is brought here, it will be observed, by the vendees or purchasers at the sale, although before that, Bondholders, without even the assent of the counsel for the trustees.

It is respectfully suggested, that this is an important fact to be borne in mind in the subsequent examination of the case, because, whatever the rights of Fosdick and Fish, the trustees, may have been, it does not follow that the vendees succeeded to all of them.

Most all the allowances made by the Court for this and kindred claims were acquiesced in by all the parties and counsel concerned, and many of the orders were entered by consent, no resistance being made to any of them until it was apparent that the powers of the Circuit Court were nearing a conclusion.

In support of this statement the attention of the Court is called to the list of claims paid by consent.

Additional Record, page , filed in No. 940 present term.

And the opposition now made is in gross violation of the tacit understanding had by the Court, parties and counsel, that if this road was to be held by Receivers, and the power of the Court invoked to run it and manage it for the benefit of the Bondholders, these claims incurred for their benefit and in their interest were to be paid, which understanding was acquiesced in by all the parties concerned, all having knowledge of it, and is only violated in this and two other instances.

The particulars of the transaction between Michael Schall, the appellee in this case, and the railroad, are fully stated in the intervening petition of appellee,

Printed Record, p. 74.

and in the copy of a letter attached to the testimony,

Printed Record, p. 99.

and the finding of the Court in the order directing the payment,

Printed Record, pp. 100, 101.

And the attention of the Court is especially directed to the fact that each car was marked with the words: "This car is the property of Michael Schall, York, Pa.," and that the Court below found that the petitioner (appellee) was entitled to the possession of the cars, and further found that $5,118.75 of the $14,568.75 total amount allowed was for rental of cars while in the actual possession of the former Receivers, and the balance of the claim, $9,450, was for the use of the cars for the six months anterior to the appointment of the Receivers, being at the same rate which was paid by General Anderson, the Receiver, during his term of office, with the approbation of the Court, for these identical cases.

Vide Testimony of General Anderson,
Printed Record, pp. 95 to 99, inclusive.

The Court will also observe that in the schedule of personal property included in the final decree, ordered to be sold,

Printed Record, pp. 89, 90,

and subsequently sold by the Master in Chancery and reported by him,

Printed Record, p. 93,

these cars are not included, either by number or name, and that the possession now held by the purchasers is entirely illegal and arbitrary.

It will also be observed that this appeal is not taken by the trustees, they not having joined in the Bond, nor does the assent of their counsel anywhere appear.

ARGUMENT FOR APPELLEE.

I.

The cases of *McCarty* v. *Carter*, 49 Ills., 257, and *Judson* v. *Stephens*, 75 Ills., 257, cited by appellant, (p. 10,) are not analogous to this one. In those cases a party holding a leasehold interest, contracted for the erection of a building, and in the former, the Court held that the receipt of rents by owner was not a ratification of the building contract, and in the latter, that under the statute the mechanic could only claim a lien upon the interest of lessee.

The cases of

Reed v. *Bank of Tenn.*, 1 Sneed., 262,
Jessup v. *Stone*, 13 Wis., 466,
Prior v. *Munn*, 4 Cal., 175,

all hinged upon the peculiar phraseology of the statutes in those States, and can have no bearing on this case.

In the cases of

Otley v. *Howland*, 36 Miss., 19, and
Getchell v. *Allen*, 34 Iowa, 562,

the courts hold that the mechanic is entitled to a lien upon the *building* erected on mortgaged premises, though not on the land, the Iowa court making a distinction which the counsel, in citing, very carefully omitted, between a new building erected and repairs made on an old one.

Smith v. *Hughes*, 24 Ill., 270,

does not announce any such doctrine as claimed, and in the cases *Williams* v. *Chapman*, 17 Ill., 423, and *McLogan* v. *Brown*, 11 *id.*, 519, the question was not directly raised, the cases being decided, the first, on the ground that mortgagors, and the other, that judgment creditors were not made parties to the proceedings.

Dunn v. *N. Mo. R. R.*, 24 Mo., 493,
McAuley v. *W. Vt. R. R.*, 33 Vt., 323,

were decided on an entirely different state of facts from those existing in the case under consideration, and turned mainly on the construction of the statutes of those States.

II.

Appellee is clearly entitled to a lien, the cars furnished being in the nature of supplies.

On the 1st of July, 1872, the Legislature of the State of Illinois enacted the following.

"*Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That all persons who may have furnished, or who shall hereafter furnish, to any railroad corporation, now existing, or hereafter to be organized under the laws of this State, any fuel, ties, materials, supplies, or any other article or thing necessary for the construction, maintenance, operation, or repair of such roads, by contract with said corporation; or who shall have done and performed, or shall hereafter do and perform, any work or labor for such construction, maintenance, operation, or repair, by like contract, shall be entitled to be paid for the same as part of the current expenses of said road, and, in order to secure the same, shall have a lien upon all the property, real, personal, and mixed, of said railroad corporation, as against such railroad, and as against all mortgages, or other liens, which shall accrue after the commencement of the delivery of said articles, or the commencement of said work or labor: *Provided*, suit shall be commenced within six months *after such contractor or laborer shall have completed*

his contract with said railroad corporation, or after such labor shall have been performed, or material furnished." (Revised Stat. of Ills., 1877, Chap. 82, p. 639.)

These cars were furnished to the Railroad Company under what is commonly called a "rent contract," the contract providing for the leasing of the cars, at a certain rent, payable monthly, the lessees at the termination of the lease, to become the owners.

Clearly, the cars were supplies necessary for the operation of the road, within the meaning of the statute.

Waiving for the present, the question whether appellee is entitled to these specific cars, by virtue of the contract, we shall endeavor to show, that appellee is entitled to a lien upon any and all personal property owned by the Railroad Company, for the amount of supplies furnished.

The Constitution of the State of Illinois, adopted by the people of that State, July 2d, 1870, and in force August 8th, 1870, provides as follows:

"The rolling stock, and all other movable property, belonging to any railroad company, or corporation, in this State, shall be considered personal property, and shall be liable to execution and sale, in the same manner as the personal property of individuals; and the General Assembly shall pass no law exempting any such property from execution and sale." (Const. State of Ill., 1870, Article 11, Sec. 10.)

The trust deed relied upon by appellees is a *nullity so far as it seeks to mortgage personal property* of the Railroad Company.

The Statute of Illinois, regulating the execution, acknowledgment and recording of chattel mortgages, is as follows:

"*Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That no mortgage, or trust deed, or other conveyance of personal property, having the effect of a mortgage or lien

upon such property, shall be valid as against the rights and interests of any third person, unless possession thereof shall be delivered to, and remain with the grantee; or the instrument shall provide for the possession of the property to remain with the grantor, and the instrument is acknowledged and recorded, as hereinafter directed, and every such instrument shall, for the purposes of this act, be deemed a chattel mortgage.

"2. Such instrument may be acknowledged before a *Justice of the Peace* of the town or district where the mortgagor resides, or, if the mortgagor is not a resident of this State at the time of making the acknowledgment, then before any officer authorized by law to take acknowledgments of deeds. The certificate of acknowledgment may be in the following form: * * *

"3. If the acknowledgment is of a resident of this State, the Justice of the Peace shall enter in his docket a memorandum thereof, substantially as follows: * * *

"4. Such mortgage, trust deed, or other conveyance of personal property, acknowledged as provided in this act, shall be admitted to record by the recorder of the county in which the mortgagor shall reside at the time when the instrument is executed and recorded; or, in case the mortgagor is not a resident of this State, then in the county where the property is situated and kept; and shall, thereupon, if *bona fide*, be good and valid from the time it is filed for record until the maturity of the entire debt or obligation: *Provided*, such time shall not exceed two years." (Ill. Rev. Stat., 1877, Ch. 95, Secs. 1, 2, 3, and 4, p. 674.)

The Supreme Court of Illinois have frequently had occasion to construe this statute. It has repeatedly been held that to give an instrument the effect of a chattel mortgage, when the mortgaged property remains in the possession of the mortgagor, the requirements of the statute must be strictly complied with. The failure to have the instrument acknowledged before a *Justice of the Peace of the town or district where the mortgagor resides*, is a fatal defect.

Gregg v. *Sanford*, 24 Ills., 17.
Henderson v. *Morgan*, 26 Ills., 431.
Porter v. *Dement*, 35 Ills., 478.

The grantor in this case, was a *resident of the State of Illinois*, and the instrument purporting to convey chattel interests was acknowledged *before a Notary Public of New York City.*

That Court has also laid down the rule that railroad corporations, as well as individuals, are governed by the law prescribing how personal property shall be mortgaged.

In the case of *Palmer* v. *Forbes*, 23 Ills., 248, cited by appellant, and so quoted as to convey the impression that he was giving continuously the portion of the opinion embodied in his argument (p. 15) the Supreme Court say:

"The road and property of the company may include its personal property, as well as the real estate, consisting of the road and its appurtenances. As there is no specification as to how personal property shall be mortgaged, the *general law regulating chattel mortgages is left to regulate the mode of executing that power.*"

The trust deed relied upon by appellants was void in any event as to personal property acquired after its execution.

Subsequently acquired property is not held by a chattel mortgage, but if property comes into the possession of the mortgagor *before other liens attach*, it may create an equitable lien which a court of chancery will recognize and enforce.

Hunt v. *Bullock*, 23 Ills., 325.
Gregg v. *Sanford*, 24 Ills., 17.
Titus v. *Maher*, 25 Ills., 257.

Even if the trust deed had been properly acknowledged, it could not, under the statute, have bound personal property for more than two years from its execution, and at the end of that time, the personal property of the

Railroad Company would have been subject to the lien of the contractor or laborer.

Cook v. *Thayer*, 11 Ills., 617.

It is evident, then, that appellants did not, by the trust deed, acquire any lien upon the personal property of the Railroad Company, that could shut out the lien given by the statute to the person furnishing labor or supplies.

Appellee has not lost its lien by the delay in filing its petition.

The possession of the Receiver was for the benefit of all parties who might at the determination of the suit be found to be entitled to the property, and prevented the lapsing of the lien of appellees by limitation.

Wrixon v. *Vize*, 3 Dr. and War., 104.

The statute of Illinois, before cited, limits the time for petitioning for such lien as follows: "*Provided* suit shall be "commenced within six months *after such contractor or* "*laborer shall have completed his contract* with said rail-"road corporation, or after such labor shall have been "performed or material furnished."

At the time of filing the petition of appellee the contract could not have been said to be completed.

If there was in the possession of the railroad company, at the appointment of the Receiver, any personal property, appellee is entitled to a lien upon it to the amount of its claim. All the property of the Road, real, personal and mixed, was subject to the payment of its debts. On the real estate the appellants and the other Bondholders had a first and prior lien. On the personal property the appellee's lien had precedence over that of appellants.

A similar distinction was made in two cases, cited be-

low, when the courts held the lien of a mortgage to be prior to that of a mechanic on the *land*, but gave precedence to the lien of the mechanic on a *building* erected on the premises subsequent to the record of the mortgage.

Otley v. *Haviland*, 36 Miss., 19.
Getchell v. *Allen*, 34 Iowa, 562.

If then the railroad company, at the time of the filing of petition by appellee, had enough personal property to cover the amount of the decree, no harm has been done appellants, and the court below has committed no error.

There is enough in the record to show that large quantities of rolling stock had been purchased by the Railroad Company since the adoption of the constitution of 1870. All this must be held to be personal property, and as such, not covered by the lien of the trust deed. Between the mechanic or material man and the principal debtor, the limitation clause in the statute relating to mechanics' liens has no application.

Jennings v. *Hinkle*, 81 Ills., 183.

Appellants, claiming under a trust deed void as to personal property, will not be allowed to contest the lien of appellee upon such property.

III.

By the terms of the trust deed, before any of the proceeds of the sale could be applied to the payment of the bonds, the trustees were required to deduct all advances and liabilities which had been made or incurred by the trustees in operating the said railroad and property, and in managing its business and affairs while in possession,

and all payments for taxes, *charges* and assessments on *said premises, or any part thereof.*

Printed Record, p. 19.

Surely, under this clause of the mortgage, the Court was authorized to enter the decree it did, *in the absence of any statute prescribing a lien*, and it was done in precise accordance with the prayer of the complainants in their original bill:

"And that pending this suit a Receiver may be appointed, of all and singular of the said railroad, with all its appurtenances, franchises, rolling stock or equipment, and all the income and earnings thereof, and all other of said mortgaged premises, properties, rights, and equities, *with such orders and directions in respect to such receivership and the fruits thereof as shall be equitable and proper*, and that your orator may have such other and further relief, &c."

Additional Record, p. [illegible].

The Amended Bill, it will be observed, does not pray the appointment of a Receiver, simply asking that the one appointed by virtue of the prayer of the Original Bill, may still hold the road, and hence the necessity of the production of the Original Bill, omitted in appellants' record.

IV.

Appellee is entitled to the possession of the cars, and the sum decreed for their use, under its contract with the Railroad Company, in the absence of any statutory lien.

So far as we have been able to ascertain, no Court has yet decided that a contract, similar to the one in controversy, was void, or of no validity as *between the parties and their privies.* It is only as to innocent purchasers and judgment creditors that such an agreement is void.

The reason of the rule is, that the transfer of the possession of personal property without a transfer of title, might enable the holder and apparent owner to obtain credit on the strength of such possession.

The reason of the rule is entirely lacking in this case.

The Court below has found that each of these cars when delivered to the Railroad Company, was marked "This car is the property of Michael Schall, York, Penn."

Printed Record, p. 101.

This *was no secret lien*, but proclaimed to all who saw the cars, wherever they might be, that they did not belong to the Railroad Company, and was a much more effectual notice to the public than the recording of any intrument could be.

Even the Trustees and Bondholders, we apprehend, would be bound to take notice of this, as they in fact did, their Receiver testifying:

"The cars are the property of Mr. Schall, now."

Printed Record, p. 98.

And the Receiver having, under the direction of the Court below, paid the rental, recognizing the appellee as the owner, was it not a fair deduction to be made by the appellee that he was to be paid the rental for the period already fixed by the Court, and have his cars returned.

Otherwise, it is not too strong an expression to say that, under the orders of the Circuit Court, *he has been legally entrapped.*

There was a recognition of the ownership by the Court through its Receiver holding the property for these identical bondholders, and can these vendees now set up a counter claim, even admitting that they stand in the shoes of the Bondholders, (which they do not), by virtue

of a sale of personal chattels made under an invalid mortgage, the schedules to which *did not include this property.*

Would not any litigant have been lured into security when the Receiver, appointed by the Court, sought him out and arranged with him to use the cars, during the time that he (the Receiver) held the road by paying him a rental, and also making a conditional arrangement by which they could be purchased.

Testimony of Gen. Anderson, printed Record, p. 96.

The doctrine has never been carried to the extent claimed by appellant, that a mortgagee, as regards such a contract, occupies the position of a judgment creditor or innocent purchaser. As well might the mortgagee of a farm and stock, claim the horse of a neighbor at pasture on the premises.

We have yet to find a case where such a rule has been announced in a Court of Chancery. The whole tenor of equity jurisprudence is against it.

The cases in the Illinois Reports cited by appellant, in which such contracts have been construed and adjudicated upon, were all suits at law, where the rights of innocent parties had intervened, and in the case of *Hervey* v. *R. I. Locomotive Co.*, 4 Otto, 664, the Locomotive Co. replevied an engine which appellant had purchased at a sheriff's sale, by virtue of an execution against the person having possession of the locomotive.

In each of these cases any other rule than that adopted by the Court would infringe the rights of innocent parties.

Can it be for a moment seriously controverted that

the *equities* of the appellees are greater than those of appellants?

The tendency of courts has been to sustain contracts reasonable and *bona fide* between the mortgagor and others, especially when the object is to *carry on the business which is mortgaged, or involved in the mortgage.*

Fay v. *Cheney*, 14 Pick. (Mass.,) 399.

We cannot think that a court of equity will lend its assistance to any such lawless and unjust confiscation of property as is here attempted.

We think that we have successfully established that this appellee is entitled to the possession of the cars, and we have, beyond question, shown that the Court, in the exercise of a sound discretion, could have ordered the return of the cars to the appellee, or, as it did, order a payment for rental for the time they were used, and their subsequent return, and if the Court had power to order the return *a fortiori*, how much more strong the power to order the payment of an equitable rental, certainly, while in the hands of Receiver or Receivers of the Bondholders.

The right to the possession of the cars, carries with it the right to the moneyed decree.

It will be noticed that the trustees and complainants in the original case, though nominally having prayed an appeal, do not sign the bond, and this appeal is prosecuted in the interests of the purchasers, who had notice at the time of sale of the claim of appellee.

V.

Thus far we have discussed this case in what may be termed technically, its legal and equitable aspect under the decisions cited, and the form of argument presented by appellant. And while we feel we are clearly right, and entitled to the order of the Circuit Court, under the law and decisions given, we come now to the broader or more general view of the case, as applicable to its peculiar condition.

Much has been said in appellant's brief about what is termed "sentimental equity." We are not familiar with that kind of equity, and we feel confident that it is the first time that any decision of the learned and able judge of the Circuit Court for the Northern District of Illinois, has been so spoken of, and that he and his friends will be somewhat surprised at the charge.

His Honor, Judge DRUMMOND, in making the allowances that he has made in this case, as well as in others of a similar sort, did take a broader view of his powers as a chancellor, than those which might be derived from any pre-supposed lien.

And in a case in which some similar questions arose, decided in May last, he has thus expressed himself, *inter alia* :

" Now these principles are applicable, I think, to contracts that have been offered in evidence in this case, and under which claims are made against the railroad. For whatever has been performed or done under these contracts which has gone to the benefit of the railroads, compensation should be given, not upon the rule of the contracts themselves, but upon the principles of justice and equity that a railroad company should not receive anything for which compensation should not be given.

A Court, in taking the management and control of and operating a railroad, has to lay down some rule in relation to paying parties who have furnished materials and supplies, and who have performed work. And it will always happen whenever a Court takes control of a railroad that at that time there will be services being performed; there will be materials and supplies being furnished and which have been recently furnished, and work which has just been done. Now it is hardly practicable or possible for a Court of Equity to say that the very moment that the Court has taken possession of the road, that all compensation for anything that has been done previously, or for any supplies that have been furnished previously shall then, at that moment, be stopped, and that for everything that is obtained in the future or done in the future, that alone shall be paid for by the Receiver. It has been found indispensable, and as an act of justice and equity to those who are dealing with railroads, that there shall be some allowance made for past services, and for materials and supplies which have been furnished in the past. Of course it is always a matter of very great difficulty, and a question of very great doubt, where you are to fix the line, when you shall say you will allow compensation to be made. As I stated during the argument, we have adopted a rule in this State which has the advantage of being a fixed and permanent rule. That is to say, a limitation which furnishes a sort of guide, so that it is not a rule to be controlled and governed by the equities and hardships of each particular case; but that while the Court will look to all the circumstances and facts in each particular case, there shall be what may be called a fixed rule established. It may be a matter of doubt, perhaps, whether the Court has not gone too far under the decision of the Supreme Court of the United States in allowing these claims, gone too far back, that is to say; however, I do not feel inclined to depart from the practice which has been established. It does allow the employees or persons who have done work, persons who have furnished supplies and materials, a compensation for all that has been done, and all the suppiles that have been furnished within a reasonable time; and of course there must be a limit to this. It is impossible for the Court, in view of the just protection which should be given to those who have claims upon the road to go back an indefinite time; and if the road has allowed large accumulations of indebtedness to exist against it, to pay all that indebtedness, whatever it may be, and how far-soever back it might go."

Turner v. *Ind., Bloom. & W. Ry. Co., et al.*

From the inception of this case, down to the sale, the

powers of a court of chancery were invoked by and used for the exclusive benefit of these bondholders, asking for that species of decree which a court of chancery alone could give them, declaring the whole amount of the mortgage due, simply upon a default of interest, which certainly could not be conscientiously exercised without a careful guardianship of the interests of all involved in the result of such a decree.

The appointment of a Receiver in equity is the exercise of an extraordinary power, and that aid and the exercise of that power, and the immense stretch of a chancellor were invoked by those very people who now find fault with the smaller decrees. The Receivers were appointed that their rights might be concentrated, their property protected, and the interests they had in this line of railway be preserved from the time the Receivers went into possession until the property was turned over to the purchasers.

For the benefit of these appellants, all this property, which, had it been permitted to remain idle, would have deteriorated until it became almost valueless, was preserved, maintained, operated, and its value actually increased, under the direction of the court and its Receivers.

For their advantage, these cars were hired and used, and were, the Receiver tells us, indispensable to the working of the road. These cars carried their freight, and brought in their revenue.

Can it now be said, in a court of equity, that the very beneficiaries, from the protection given, are to defraud still further this unfortunate manufacturer? *Certainly it is not just, and therefore cannot be equitable.*

R. BIDDLE ROBERTS.

CHICAGO, FEBRUARY, 1878.

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Sentinel Company, Printers, Indianapolis, Ind. [*October*, 1878.

SUPREME COURT OF THE UNITED STATES.

WILLIAM R. FOSDICK,
AND OTHERS,
vs.
MICHAEL SCHALL,
Intervenor.
CHANCERY.

Appeal from Circuit Court of the United States for the Northern District of Illinois.

Argument in support of the discretionary power of Courts of Equity to require payment of railway operating expenses incurred prior to appointment of Receiver.

BY

JOHN M. BUTLER,
Solicitor.

Sentinel Company, Printers, Indianapolis, Ind. [*October*, 1878.

SUPREME COURT OF THE UNITED STATES.

WILLIAM R. FOSDICK, ET AL.,
Appellants,

vs.

MICHAEL SCHALL,
Appellee.

APPEAL FROM CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 631.
Present Term Docket.

ARGUMENT IN BEHALF OF McDONALD & BUTLER,

BY

JOHN M. BUTLER.

We are not of counsel in the above entitled cause, and do not wish to be understood as attempting or intending to brief this particular case upon its facts and record. Being interested in cases involving the general principles to be settled by the decision in this case, we desire, under the permission granted by this Court, to submit some suggestions upon the main question involved.

I.

The appointment of a Receiver, to take possession of and operate a railway, is a matter of discretion, vested in the

Chancellor. This discretion is to be exercised in view of all the circumstances surrounding the case. The Chancellor, in the exercise of this discretion, has the right to deny, or to grant, the appointment of a Receiver.

This proposition is fully supported by text writers and judicial decisions.

Daniell's Chancery Pleading and Practice, chap. 38, sec. 1.

High on Receivers, chap. 1, § 7.

Story's Equity Jurisprudence, chap. 21, § 831.

McLean, Judge, in the case of "Williamson vs. The New Albany, etc, R. R. Co.," used this language: "It seems to be considered that a Receiver will be ap- "pointed, as a matter of course, under the mortgage "where a default has occured in the payment of any part of "the interest or principal. If this be so, the Chancellor, in "such a case, can exercise no discretion. He can do noth- "ing less than carry into effect the conditions of the bond. * * * "The appointment of a Receiver, when directed, "is made for the benefit of all the parties interested, and "not for the benefit of the plaintiff, or of one defendant "only. It is a matter resting in the sound discretion of the "Court."

1 Bissell's Reports, p. 205.

In this case the Court *denied* the motion to appoint a Receiver, notwithstanding the second default in payment of interest had occurred, and the Company was shown insolvent, and ordered the Company to apply *one-half* of all net earnings to payment of *floating debt*, not secured by the mortgage.

"Pullan vs. Cincinnati and Chicago R. R. Co." 4 Bissell's Reports, 47.

"Crane vs. McCoy." 1 Bond's Reports, 431.

In the case of "Railroad Company vs. Soutter," Mr. Justice Miller, in delivering the opinion of this Court, says, "The only doubt which this Court could have on the ques-"tion arises from the principle that the appointment and dis-"charge of a Receiver are ordinarily matters of discretion in "the Circuit Court, with which this Court will not interfere. "As a general rule, this proposition is not denied." 2 "Wallace's Reports, 521.

II.

The Chancellor, having the right to wholly deny the motion for a Receiver, or to grant it as asked, may, in his discretion, grant the appointment upon such terms and conditions as he believes equity and good conscience require.

In the case of "Pullan vs. Cincinnati and Chicago R. R. Co." 4 Bissell's Reports, 35, above cited, the Court appointed a Receiver, but left the property in the possession of the Company, and only gave the Receiver the right to receive *one-fourth* of the net income of the road for the benefit of the bondholders, the other three-fourths of the income to be applied by the Company to the payment of its outstanding obligations.

This is imposing terms most surely. Again: In the case of "Williamson vs. New Albany, etc., R. R. Co.," 1 Bissell, 198, while the Court denied the motion for a

Receiver, it virtually took possession and full control of the railroad property, and divided the fund arising from its operation, giving to the floating debt creditors *one-half* of all the net earnings If the Court could do this without appointing a Receiver, we can see no reason why the same thing could not have been done through a Receiver. It was equivalent to the appointment of a Receiver *upon terms.* The power to *deny* or to *grant* a Receiver on motion of bondholders or their trustee seems necessarily to imply the power to grant a Receiver *upon terms.*

Especially is this true regarding railroad property, in which the public have rights and interests as well as the bondholder, and in which values and important rights and franchises can be preserved only by continuing the operation of the property in accordance with its original design and charter rights. The trustee and, through him, the bondholders come into a Court of Equity and ask the Court to seize and hold all the property and rights for their benefit. As has been shown, the Chancellor has the right to say to them, "No, I will not seize this property." If he has that right it surely follows that he has the right to say, "Upon condition that such and such payments are made out of the property and its income, I will seize and hold it for your benefit." The right to so impose terms and conditions grows out of the peculiar character of the property—its public uses, its valuable intangible rights, dependent wholly upon continued and uninterrupted use, the necessity of preserving its business, good will, and connections with other roads and enterprises, in which the general public have an interest. The bonds are originally sold with all these circumstances and conditions in view, and

subject to them. Hence, a Court of Equity has the right to duly regard and provide for these rights and uses in any seizure of the property for the benefit of the bondholders. Experience has proved the necessity of imposing terms. Very few, if any, railroad receiverships have been granted, except upon terms requiring payment of obligations incurred by the company prior to the receivership, these terms either being embodied in the order appointing the Receiver, or in orders made subsequent to appointment. Our belief in the soundness of the two propositions already stated is strengthened and confirmed by this further consideration.

III.

The power of Courts of equity to PREFER *debts created or incurred by or through their Receivers, and give them priority over the mortgage lien, even although the Receiver's debts were incurred for purposes other than the preservation of the property, is admitted as settled law, and has been repeatedly sanctioned by judicial decision.*

If the court has power, after taking possession of a railroad and appointing a Receiver at the request of bondholders, to create an indebtedness for purposes other than the preservation of the property, and make that indebtedness a *first lien* upon the property, *prior* to the mortgage for the benefit of which the Court took possession, it would certainly be illogical and unreasonable to deny to the Court the power to require the payment, out of the property or its income, of debts incurred prior to the receivership, for

the express purpose of preserving the property and rights covered by the mortgage.

The greater includes the less. It is certainly a greater exercise of power in the Chancellor to create an indebtedness for the purpose of *completing* or *equipping* a railroad, and make that indebtedness a prior lien upon the road as built and equipped when the Court took it into possession, than it is to require the property taken into possession by the Court to pay for its *past preservation.*

In the case of "Stanton vs. the Alabama & Chattanooga R. R. Co.," reported in 2 Woods, 506, the Receivers were authorized to borrow over one million dollars to put the railroad and other property in repair and *to complete any uncompleted portions*, and the amount borrowed was made a lien on all the property *superior* to the lien of the first mortgage.

In the case of "Southerland, Trustee, &c., vs. The Lake Superior Ship, Canal, Railroad, and Iron Company," decided by United States District Judge Longyear, presiding in the United States Circuit Court for the Eastern District of Michigan, the Court ordered certificates to be issued by the Receiver and the proceeds applied *to finish a canal*, the certificates to be made a first lien upon the railroad and its property.

In the case of "Hyde vs. Sodus Point Railroad Company," decided by a judge of the Supreme Court of New York (at Brooklyn), the judge sustained a report of the Receiver insisting upon the importance of making repairs and of *constructing at one terminus wharves, piers and other fixtures to facilitate transfers of cargo to and from vessels,*

and, at the other, tracks and connections with other railroads, in order to do which work he asked for authority to issue certificates of indebtedness to the amount of $125,000, which should constitute a first lien upon the property of the company. The Court ordered the certificates to be issued.

The case of "Meyer vs. Johnston," 53 Alabama Reports, 237, while it doubts the power to create indebtedness to *build* new railroad, most clearly sanctions the power of the Chancellor to incur debt for the purpose of repairing, equipping and keeping the road in operation, *and for the purpose of paying obligations incurred prior to the receivership,* making the Receiver's debts so incurred a first and prior lien upon the property. The case was this: On the day after the appointment of the first Receiver he petitioned the Chancellor for leave to borrow $90,000, or such other sum as His Honor might prescribe, and the Chancellor thereupon, in vacation, made an order authorizing him to borrow $150,000 on certificates of indebtedness, which should have priority of payment over any other claim out of the proceeds of sales of any property in the Receiver's possession. And the authority thus granted not having been used, the two Receivers subsequently petitioned the Chancellor for leave to borrow $700,000, to be used in *purchasing rolling stock and putting the railroad and its appurtenances in repair.* The Chancellor thereupon made an order authorizing them to do so, directing that $450,000 of that should be expended in rolling stock, and undertaking to charge the certificates upon the railroad, upon its appurtenances and equipment, as a prior lien having precedence of liens created by the first and other prior mortgages, and

it seems to have been intended that the proceeds should be used in part in *enlarging and completing the work beyond what was necessary for the preservation of the property.*

It will be observed that this was a loan of an immense sum to buy rolling stock and put the railroad in repairs, and to enlarge and complete the work beyond what was necessary for preservation. It was to be a first mortgage. It was to be put upon the market, and, as the case states, was to be sold at a discount of 10 per cent. The case goes on to illustrate the growth, *ex necessitate*, of the administrative powers of the Courts respecting railways. This order was very strenuously opposed by the mortgage creditors who became alarmed at the decree. They objected and protested against it, and they denied that the Chancellor had a rightful power to give such precedence to new creditors. The Court then goes on to take up the cases and to discuss the principles upon which the order was based—and properly based. They go on to take up the cases in which the powers to raise this fund and make it a prior lien, not only with reference to the preservation of property, but with reference to the completion of an unfinished road, and to making additions to the road, were exercised. The principles upon which they are based, and the extent of the powers growing out of the necessities of the case in administering this new kind of property, are fully stated.

The material points decided, relative to the question under discussion, are stated in the syllabus, thus:

"A Court of chancery has power, after proper notice to, "and hearing of interested parties, to authorize the issue "even of negotiable certificates of indebtedness creating a "first lien, displacing other liens to that extent, on the

"property of a railroad which it is operating through its "Receiver, whenever it is necessary to raise money for the "economical management and conservation of the property.

"Mortgage creditors can not complain of a decree re- "quiring payment of unsecured debts, due by the company "before the filing of the bill, to connecting railroads for "moneys it had collected, when their refusal, because of "the failure to pay them, to continue business relations "with the Receiver, would have greatly diminished the "receipts and injured the business of the road."

The language of the decision upon these points is as follows:

"Of course property, in that condition, must be taken "care of by the Court, and the expense of this must be "paid. Generally, this is done out of the income. But if "there be no income, or it is inadequate, and it be neces- "sary for the conservation of the subject matter of the suit "that money be used, the expenses thus incurred must fall "on the *corpus* of the property. This often happens when, "after possession taken by the Court, the property is sold "and becomes a money fund to be distributed among cred- "itors, which is then itself the *corpus* of the estate.

"The Receiver may also be authorized by the Court to "borrow money, if necessary, in anticipation of the sale, to "be reimbursed, with interest, out of the proceeds of the "property when sold. And we suppose a Receiver of ap- "proved integrity and responsibility would have little diffi- "culty in borrowing money to a moderate amount in such "a case upon his note, or due bill, as Receiver. Or if a "Receiver has, under the direction of the Court, taken "moneys and used them in the performance of his duties as "Receiver, that should not have been so taken, and were "not subject to the claim of complainants, but belonged to "other parties, the Court, afterwards ruling that these "moneys should not have been so taken and applied, will, "for rectification of the error, order the amount with inter-

"est to be returned to the parties entitled thereto, out of "the proceeds of the sale of the property with which it has "been identified, with priority of payment over the oldest "mortgage debt. This was done by Justice Swayne in "*Cowdrey vs. Railway Company*, in the Circuit Court of the "United States, at Galveston, in respect to moneys which "the district judge had erroneously ordered that the Re- "ceiver should take and use—according to a manuscript "copy furnished to us of Justice Swayne's opinion.

"Matters of this nature are between the Court and the "Receivers and the parties to the suit. The transactions "are founded on the property in the hands of the Court to "be sold, and which will not be allowed to pass out of its "power without being so sold, except upon a compromise "between the parties by which all the expenses chargeable "thereon shall be paid. And in reference to the expenses, "the parties have an opportunity of canvassing and object- "ing to any that are improper, either when the accounts of "the Receiver are passed upon, or if previously authorized "by the Court, when the application for such authority was "heard and acted on. For they are entitled to be heard "in respect to them.

"Is this the limit beyond which a Court of Chancery "may not go in such matters in any case? It was not "necessary that the question of the power of a Court to "authorize the issue of first lien certificates of indebtedness "to enable a Receiver to raise the money he might need, "should be decided before the introduction of railroads. "But these properties, with their appurtenances, vast in "extent and value, yet very perishable if unused and neg- "lected, existing as the estates of private individuals asso- "ciated into corporations, but essentially public works, in "whose operations the public at large and the State are "concerned when drawn into litigation, must be dealt with "by the courts according to the nature and circumstances "of the subject. And any one can understand that the "best and cheapest mode of conserving a railroad may be

"by operating trains thereon, and keeping it in repair for "their use. To preserve its value it must generally be con- "tinued in operation, and be sold as a going concern. If "it were not for the public quality belonging to them, for "the injury that would be done to the interests of whole "communities that have become dependent on a railroad "for accommodation in a thousand things, a Chancellor "might say to the parties most interested: 'Unless you "furnish means for the protection of this property, which "does not itself afford an adequate income for the purpose, "it may become a dilapidated and useless wreck.' But "the inconvenience and loss which this would inflict on the "population of large districts coupled with the benefit to "parties who are perhaps powerless to take care of them- "selves, of preventing the rapid diminution of value and "derangement and disorganization that would otherwise "result, seem to require, not for the completion of an un- "finished work, or the improvement, beyond what is nec- "essary for its preservation, of an existing one, but to keep "it up, to conserve it as a railroad property, if the Court "has been obliged to take possession of it, that the Court "should borrow money for that purpose, if it can not other- "wise do so in sufficiently large sums, by causing negotia- 'ble certificates of indebtedness to be issued constituting "a first lien on the proceeds of the property, and redeema- "ble when it is sold or disposed of by the Court.

"It is also insisted for appellants that the Receivers "should not have been authorized by the order of the "Chancellor, in June, to pay (as it is put) to certain credi- "tors without liens a sum not exceeding $6,800, and that "the mortgagees are entitled to have this sum refunded. "On examination it seems that this amount was composed "of sums collected by the defendant company, in trust for "several connecting railroad companies, to which the "money belonged. To withhold the payment of these "moneys from the corporations for which they were col- "lected would have been a breach of trust, and probably it

"would have been resented by the refusal of these com-
"panies to keep up business relations with the defendant
"company, or the Receivers, without which relations the
"business of and receipts from the road would have been
"greatly diminished. It was proper, therefore, for the Re-
"ceivers to pay them. In *Cowdrey vs. Galveston Railroad*
"*Company*, in the United States Circuit Court at Galves-
"ton, Justice Bradley, in deciding on exceptions to a Re-
"ceiver's account of expenses, allowed, for the reason as-
"signed above, payments made as rebatement of freight to
"shippers of cotton, in order to secure their custom and
"increase the business of the road, this being done by
"other companies."

From these authorities it is plain that the Courts have been compelled to recognize the wide difference existing between a railroad mortgage and an ordinary real estate mortgage. From this difference arises the increased power of the Courts, as Courts of Equity, in adjudicating the rights under this class of mortgages. Judge Bradley well stated this difference in a case reported in 2 Wood's, in which he says a railroad is "a public work, in whose operation the "public at large and the State are concerned. When drawn "into litigation it must be dealt with by the Courts according "to the nature and circumstances of the subject." Hence, as he says, arises the "capacity and duty of Courts of "Equity to adapt their decrees to all varieties of circum-"stances which can arise, and adjust them to all the peculiar "rights of the parties in interest."

This difference between a railroad mortgage and the ordinary real estate mortgage will be referred to more at length hereafter. We only call attention to it here as furnishing an abundant reason for the exercise by the Chancellor, of the power under discussion. Having shown: 1. That

the appointment of a Receiver rests in the discretion of the Chancellor, with power to wholly deny, or to grant as asked. 2. That in the exercise of this discretion the Chancellor may appoint a Receiver upon such terms and conditions as he believes equity and good conscience require, and, 3. That courts have repeatedly, in railroad litigations authorized their Receivers to contract indebtedness for obligations incurred prior to the receivership and for the improvement, equipment and extension of railroads, making such indebtedness a prior lien, superior to the mortgage, and that this enlarged power of the Court grows out of, and is a necessary incident to the peculiar character of, and circumstances surrounding, railroad property, we state as our fourth proposition, that,

IV.

The Chancellor, in appointing a Receiver of a railroad, has the power to require payment out of the property, or its income, of debts necessarily contracted in the proper management, and operation of the road, and due for labor or supplies essential to its operation, to such an amount and for such a period prior to the receivership, as, in his discretion, he believes necessary for the full conservation of the property, taking into consideration its public character, its good will, its terminal, and other connections, the preservation and development of its business, and its future welfare and value.

This proposition is a necessary inference from the principles and authorities upon which the right of the Chancellor to appoint a Receiver rests. Receivership is an equitable

seizure by the Court for the express purpose of *preserving the property* pending the determination of rights and interests in it by litigation. The principle upon which the right of the Court to seize the property rests, *requires* the Court to *preserve the values seized* if possible. If this *preservation of values* requires the payment of an obligation incurred by the Company *prior* to the receivership, the power of the Court to make that payment is just as perfect as is the power to pay any obligation incurred *after* the receivership begins *for the same purpose*. The Chancellor is to determine whether the payment of back pay-rolls and supply bills will, or will not, aid in the preservation of the property and its value — that is a question addressed to his discretion in the determination of which he must consider the peculiar character of the property, the elements of its value, and all the circumstances surrounding it. If on full examination he thinks that the property will be injured — that its present value will be diminished, and its future value impaired, by *refusing* to pay back pay-rolls and supply bills for a limited period, it is his absolute duty to make such payments as he believes will best preserve the present and future value of the property. If, in the exercise of his discretion, the Chancellor determines that the preservation of rights, franchises and property seized, *requires* a *limited payment* of back dues for labor and supplies, he must next determine the *period*, or limit, back to which, the best conservation of the property and its interests require payment to be made; this also is a question addressed to the discretion of the Chancellor. If the Court is charged with the preservation of the property, *it must be vested with discretion* as to the *manner* and *matter* of best preserving it.

The period for which such payments may be made must be determined by the Chancellor in each case upon its peculiar circumstances, and with this one consideration in view, viz.: what will best preserve this property and all its elements of value?

In this connection we wish most distinctly to state that we do *not* base the right of the Court to require back dues to be paid by its Receiver out of the property or its income, upon any lien given by statute, either in Illinois or Indiana.

His Honor, Judge Drummond, Circuit Judge of this (7th) Circuit, has uniformly fixed *six months* as the period, prior to the commencement of the receivership, for which back payments, for labor and supplies necessary to operate the road, should be made in aid of the conservation of the property. Other Circuit Judges have fixed longer or shorter periods as to them seemed best.

Perhaps these considerations may have influenced Judge Drummond in fixing six months as a uniform — but not inflexible rule:

1. His long and very large experience in this class of cases has led him to believe that in most cases the best interests of the property, taking into consideration its character, purposes and elements of value, its past preservation, and the public interests connected with it, require the payment of back operating expenses for that period.

2. The fact that the Illinois Legislature has named six months in its statutory lien in behalf of railroad employes and supply and material men, coupled with the fact that there is a well recognized advantage and great propriety in having a uniform rule of practice, may have had some weight in the establishment of what is recognized in our circuit as the six months rule.

3. The fact that many—nearly all—railroad mortgages, by their express terms, prevent possession being taken by the Trustee, or foreclosure decree and sale, for *six months* after default in payment of interest, thus contracting in advance, so far as the terms of the mortgage are concerned, that the earnings for six months after default may be applied by the company upon its obligations not secured by the mortgage, may have been suggestive to the mind of the Chancellor of six months as a maximum time, to be shortened in cases where payment for a shorter time will fully protect, maintain and preserve the property, rights and business of the road, and equitably compensate for its *past* conservation.

Whatever may have led to the establishment of six months as the uniform time we do not base the right to require payment of back dues for labor and supplies upon the Illinois lien law; nor do we claim any *inflexible* rule as to time. Our claim is just this: That the Court has the power to require its Receiver to make such payments, *if the Court, in the exercise of sound discretion, believes such payments will best subserve, promote and preserve the interests of the trust in its possession.* Whether any such payments of back operating expenses are necessary, and if so, for what period prior to the receivership they should extend, are questions addressed to the discretion of the Court in *each case.*

The fact that such payments have been required by the Courts in almost every case of appointment of a Receiver of a railroad company—we have not been able to find or hear of a single case in which no back dues were paid by the Receiver—and the further fact that such payments have very frequently been made with the full *consent of the*

mortgagees, are potent reasons for believing that *the proper conservation of the trust does require such payments of back dues to be made*, and constitute a strong argument in support of the power and authority of the Chancellor to require such payments to be made. We are not without carefully considered adjudicated cases in support of this proposition.

Meyer vs. Johnston, previously cited, is directly in point. The last paragraph above quoted from the decision of that case shows that the Chancellor ordered the Receiver to pay back dues to connecting railroads, balances on interchange of freight and passengers due and unpaid at the time the Receiver was appointed. These debts were certainly of no higher obligation than debts due brakemen and engineers, or debts due for the use of cars or locomotives. Yet the Court required their payment as an aid in preserving the value of the property, or, to use again the language of the Court, because "to withhold the payment of these "moneys from the corporations for which they were col- "lected would have been a breach of trust; and probably it "would have been resented by the refusal of these companies "to keep up business relations with the defendant company "or the Receivers; *without which relations the business of and "receipts from the road would have been greatly diminished.*"

Upon the same ground Justice Bradley, in the case of "Cowdrey vs. Galveston Railroad Company," permitted the Receiver to make payments "as rebatement of freight "to shippers of cotton, *in order to secure their custom and in- "crease the business of the road*," the same thing being done by other companies.

The case of "Douglas vs. Cline," decided by the Court of Appeals of Kentucky, September, 1876, is another case directly in point.

That case was an appeal from the order of the Chancellor directing the Receiver to pay to persons represented by the appellees (employes of the railroad company), the amounts due them, aggregating $134,481, out of the net earning of the road then in his hands. The Court of Appeals, after full hearing, refused to reverse the order. The Court held that the question was as to whose equities were superior; that the mortgagees could not complain that in granting them equitable relief as to the incomes and earnings the Chancellor had imposed just and reasonable conditions; that the equitable rights of mortgagees may be subordinated to the claims of a class of persons who have by their labor enabled the mortgagor to discharge its *public duties* and thereby *protect* and *preserve* the rights and franchises which might otherwise have been forfeited.

Upon this point we quote the language of the decision:

"It was through the labor and services of these appellees, "performed and rendered after the railroad company had "become notoriously unable to meet its indebtedness, and "during a period when these appellants either could not or "would not interfere to protect and preserve their mort-"gage security, that the company's roads were operated, "and its duties to the public discharged. And, as we "have already seen, it was by this labor and these services "that said mortgaged property, during this period, was "preserved and kept in repair. It is plain, therefore, that "the debts due to the appellees were contracted for labor "which resulted in substantial advantage to the parties "who are here insisting that their payment out of a fund "to which said parties have no legal or contract claim, and "which they can reach only through the intervention of "the Chancellor, is an abuse by that officer of his equita-"ble discretion. It was to the interest of the lien-holders, "and especially of those represented by Douglas, that the

"Receiver should be enabled, pending the litigation, to "operate the roads of the company successfully and "profitably. To secure immediate success in this regard "it was desirable, if not indispensably necessary, that he "should be enabled to retain in his service the force of em- "ployes he found in the service of the company when he "took possession of its roads.

"One of the principal grounds of complaint urged "against the management of the company by both Green "and Douglas was the discontent upon the part of the "employes and laborers constituting this force, resulting "from the non-payment of their wages.

"It was the duty of the Chancellor to allay this discon- "tent, and to assist the Receiver in securing the services "of these people, and thus insure the profitable manage- "ment and operation of the roads in his hands, if this "could be accomplished by an act manifestly just, cer- "tainly within the scope of his judicial powers, and to "which the appellants ought not, in good conscience and "fair dealing, to object."

In the case of "Duncan and Calhoun, Trustees, vs. Chesapeake and Ohio Railroad Company and others," Circuit Court of the city of Richmond, Virginia, American Law Register, July, 1876, the Court held as follows:

"Employes of a defaulting railroad company are not to "be considered as creditors at large of the company in re- "gard to their claims for wages in arrears at the time of "the appointment of a Receiver for the company.

"When mortgagees come into a Court of Equity seek- "ing satisfaction of their claims against a railroad com- "pany by suit for foreclosure, they should be required to "satisfy all arrearages of pay due employes out of the trust "property or its future earnings."

This was a cause in equity, which came up on motion and was heard at the February term, 1876, of the Circuit Court of the city of Richmond, on the report of the Hon. W. C. Wickham, Receiver, asking the instructions of the Court as to the disposition of the surplus earnings of the railroad, and requesting to be allowed to discharge the arrears of pay due employes prior to his appointment as Receiver.

We quote that part of Judge Wellford's decision bearing directly upon the proposition under discussion:

"The creditors of the Virginia Central Railroad Com-
"pany, as well as all the creditors of the Chesapeake and
"Ohio Railroad Company, who are practically interested
"just now in any orders of this Court, claim under obliga-
"tions of those companies secured by several deeds of
"trust executed by the respective companies, conveying in
"very comprehensive terms all corporate franchises and
"rights of property. These deeds were frequently in
"common parlance, and are sometimes in these pro-
"ceedings, styled mortgages, and I shall accept the phrase-
"ology, notwithstanding its inaccuracy.

"It was a substantial part of all these mortgages that
"the custody, control and administration of the trust prop-
"erty should be left undisturbed in the hands of the rail-
"road company, not merely until default in the terms of
"their covenants, but, thereafter, until, in the intelligent
"discretion of the trustees, or upon the command of a
"large fractional representation of the bondholders, or in
"the judgment of a court of competent jurisdiction, such
"custody should be changed.

"The character of the security offered for the invest-
"ments asked by the corporation in placing its bonds upon
"the market, made this provision of the mortgages a most
"essential element of the contract. Each mortgage con
"templated an indefinite number of *cestuis que trust*, varying

"in amount of interest and subject as to persons and "amount to all the fluctuations of the money market. "The security tendered was not to be measured in its value "by the probable result of any every-day sale under the "hammer of the auctioneer. The great value of the se- "curity consisted in the importance of the franchise and "the providence with which the money contributed for its "development should be appropriated to the construction "of a great inter-state highway, the accumulation of all "necessary material for transportation of persons and prop- "erty, and an economical and energetic prosecution of the "work. The corporation was engaged in a great experi- "ment, and upon the success of that experiment necessarily "depended, to a great extent, the value of all its obligations. "But it was a corporation based upon solid and substantial "investments, to which millions of money had been contrib- "uted by the Commonwealth and several of the counties of "Virginia, and many individual citizens of Virginia and "her sister States.

"The value of all this investment of capital was at stake, "and made subordinate by the mortgages to the value of "the bonds. The guarantee of the intelligent and watch- "ful self-interest of the stockholders to insure the success "of the experiment, was, therefore, no inconsiderable ele- "ment in the security of the bondholder.

"Until the administration of the trust property was "assumed by this Court through its Receiver, none of the "Trustees, in the exercise of their discretion, or in obedi- "ence to the command of the requisite number of *cestuis que* "*trust* ever suggested, in the discharge of their trust, the "propriety of dispossessing the constituted officers of the "Company. The Receiver of this Court, under the orders "of this Court, acquired possession of the trust property "only from those constituted officers.

"All of these mortgages, it will be observed, invited "the investment of capital upon faith in the security of an "uncompleted railroad, and every purchase of a bond

"involved upon the part of the purchaser a like confidence, "to a certain extent, with that which the State in conferring "the franchise, and the stockholder in investing his money, "reposed in the executive officers of the Company for the "faithful and energetic discharge of the duties assigned to "them by the fundamental law of the corporation. That "duty involved the prosecution to a successful completion "of the projected railroad, and as rapidly as it could be "completed even partially, the administration and conduct "of any completed parts as common carriers of persons and "property, under all the obligations as such to the State and "the public. In consideration of their paramount interest, "the bondholders were invited to confide, and by their "acceptance did confide, to the stockholders the selection "of these officers, until after default of the Company, they "might elect to enforce the trusts of the deeds.

"In the meantime these officers, in the common interest "of stockholder and bondholder, were charged with their "grave responsibilities. To meet them the subscriptions of "stock having been exhausted, they could have in contem- "plation of all parties no possible means except the earn- "ings of the road and the credit of the Company, so far as "it might with recorded notice of the liens of the bond- "holders be at all available.

"Prior to any default of the Company in the payment of "interest upon the bonds, it was not unreasonable to "suppose that the credit of the Company might be available "with its officers for this purpose. But immediately upon "default, publicity of the embarrassment of its finances was "unavoidable, and after that default had continued a few "months the Company became simply a tenant at the will "of the bondholders of all its corporate franchises and "property. Thereafter the credit of the Company could "certainly not have been contemplated as adequate to the "necessities of the officers in charge in maintaining and "preserving the value of the trust property.

"What, then, had they to rely upon? Under the letter "of the contract, upon nothing but the earnings of the "road so long as it might be permitted to remain in their "hands. But it certainly ought to have been contem- "plated, in making the contract, that this might prove to "be an insufficient reliance. The earnings of the road "were necessarily subject to the vicissitudes of trade and "travel, and dependant upon the continued preservation, "in despite of all accidents, of the continuity of its road "and the regularity of its trains, and upon the confidence "of the public in the providence and watchfulness of the "officers charged with the control and management of the "road in insuring all necessary and available safeguards "against accident to life, limb, or property.

"That providence and watchfulness necessarily required "the continual outlay of large sums of money in daily ex- "penditures for purchase of material of every description "and provision for anticipated emergencies all along its four "hundred and twenty miles of track. It imposed the "necessity of the employment of a small army of subordi- "nates all along its railway and in control of every moving "train, to be controlled and directed by skilled and intelli- "gent overseers. The laws of humanity, the police laws "of two States, overriding all questions of pecuniary inter- "est in stockholders or bondholders, forbade the relaxation "of that providence and vigilance, whatever it might cost, "for one instant of time.

"These necessary supplies could not be purchased by "the pound or the piece-meal from day to day. This army "of employes could not be paid all along the roadway with "the setting of every sun. Those who furnished the one "were compelled to await the ordinary routine of auditing "and settling the account, incident to every business of "magnitude, and the employes had to await the arrival "of some periodic pay-day. If the officers in charge of "this road were under obligation to announce, upon offer- "ing to make every purchase and engaging the services of

" every such necessary subordinate that pay for such pur-
" chase or labor was to be forfeited at any moment when
" the bondholders might elect to arrest their administration
" of the road, it would have been manifestly impracticable
" to continue the operations of the road with any safety to
" the public for one single day after the right of the bond-
" holders to take possession of the road had been con-
" summate.

" Were they under any such obligation? The contract
" did not command them to surrender possession to the
" Trustees until required. They had no right of their own
" election, without the orders of the stockholders who had
" placed them in charge, to do so. Their duty under the
" law to the stockholders, and their duty under the con-
" tract to the bondholders, required them to retain pos-
" session. But if they were under any such obligation, it
" necessarily involved the impossibility of their continuing
" to conduct the road, and the unavoidable and immediate
" suspension of all trade and travel along its track. To
" say nothing here of the breach of faith to the common-
" wealth which conferred the franchise, and the great in-
" convenience to the public, in whose interests the franchise
" was granted, such a suspension would have necessarily
" impaired immensely the value of the security of all the
" bondholders.

" It appears from the record of this case that the offi-
" cers of The Chesapeake and Ohio Railroad Company
" were placed in this dilemma. There is certainly now
" nothing before me which requires any censure of their
" conduct under these embarrassing circumstances. I have
" only occasion to consider that matter, however, so far as
" it may affect the rights of those who dealt with them
" under these circumstances as the representatives of all
" parties interested in the franchises and property.

" There can be no difficulty in rejecting any claim upon
" the funds under control of the Court, preferred by any
" parties who can properly be regarded as creditors at

" large of The Chesapeake and Ohio Railroad Company,
" however meritorious the consideration upon which their
" claims against the said company may be based. Even
" if there be material furnished by any such creditors now
" in the daily use of the Receiver, if such material were
" furnished on the credit of the company, any claim on ac-
" count thereof must, in the absence of any lien retained
" by the special contract or reserved by the law, be sub-
" ordinate to the recorded lien of the mortgages.

" But can the claims of the employes of the company
" for arrearages of pay, or the comparatively small class of
" claimants referred to in the third clause of the Receiver's
" report, be properly regarded in this suit as claims of
" creditors at large of The Chesapeake and Ohio Railroad
" Company?

" I am not required to consider how these claims should
" be regarded if this were an application by the claimants
" to arrest the action of the Trustees, or any of them,
" under the powers granted by their several deeds. This
" matter presents itself as incidental in the enforcement by
" a Court of Equity of the equitable rights of the bond-
" holders under one of the deeds. So far as they are con-
" cerned, they have voluntarily subjected themselves to
" the enforcement of all equitable principles in the admin-
" istration of the property under control of the Court.
" The beneficiaries under the second mortgage of The
" Chesapeake and Ohio Railroad Company being subordi-
" nate in interest to them, must, I take it, necessarily bear
" the ill consequences, if any, of the fundamental rule of
" this Court invoked by the complainants, that he who
" asks equity must do equity.

" I am of opinion that these unpaid employes and other
" claimants referred to can not be regarded as creditors at
" large of The Chesapeake and Ohio Railroad Company.
" If it can be said that they extended credit at all, it was
" credit, not to The Chesapeake and Ohio Railroad Com-
" pany, but to the officers then in charge of its franchises,
" rights of property, etc.

"The Chesapeake and Ohio Railroad Company had "been then so long in default that the right of the bond- "holders to claim possession was fully consummate, and "this was a matter of common notoriety. It could not be "expected that the employes along the track of this road "should pause amidst their unceasing round of daily duty "to inquire whether the bondholders had or had not assert- "ed their rights and assumed control. It was enough for "them to know that the service that they were rendering "was such service as any proprietor would necessarily re- "quire, and they had a right to believe that the officers left "in notorious occupancy of the property, and charged be- "fore the public with the responsibility of its care and cus- "tody, were abundantly authorized to act for all whom it "might concern in contracting for their services.

"The same principle will run through all the gradations "of employment in this great corporation. These em- "ployes of every grade and dignity had every right to be- "lieve that so long as the bondholders stood aloof without "asserting their rights to possession, they were willing to "accept and regard *pro tanto* as their agents for the preser- "vation and protection of the property, the officers who, "placed in charge thereof by their defaulting creditor, "could not in good faith to the creditor or the debtor aban- "don their posts, or be derelict, while they held them, to the "trusts which they imposed.

"These bondholders are now in a Court of Equity seek- "ing satisfaction of their claims against the railroad com- "pany. They have a right to be satisfied to the extent of "an entire forfeiture of all the proprietary rights of the "company, but to concede to them in inforcing such for- "feiture, a right to repudiate all responsibility to satisfy "these highly meritorious claims of employes, etc., out "of the property or its future earnings, would be grossly "inconsistent with plain equity. In this forum they must "be held to be estopped from denying the authority of the "officers of the company under the circumstances, as

"agents for themselves as well as other parties in interest, "to have incurred such liability."

In "Ellis vs. Boston, Hartford and Erie Railroad Company," 107 Mass. Reports, p. 28, Wells, judge, in speaking of the receivership and the powers and duties of the Receiver, says: "Its purpose, like that of an injunction "*pendente lite*, was merely to preserve the property until the "rights of all parties could be adjudged. The Receivers are "officers of the Court for this purpose and act under its "direction and control. They continue the operation of the "road and the conduct of its business, *because this is essential "to its proper preservation. They may fulfil the contracts of "the corporation so far as beneficial.* They may not pay its "debts nor fulfil contracts which are burdensome or tend to "diminish the value of the property in their control, *unless* "such contracts are charged as incumbrances on the prop-"erty, *or are necessary to its proper preservation and security.*"

It seems, therefore, that our last proposition is well sustained, both by reason and authority, and that the Chancellor has the power and it is his duty to require the payment of back dues for operating expenses, *to such an extent as he believes such payments will aid in the best possible conservation of the trust property.* This limit he must fix at his discretion, according to the circumstances of each case.

In fixing the limit or period for which payment of operating expenses incurred prior to the receivership should be required, the Chancellor, in the exercise of his discretion, *has the right to take into consideration the past conservation of the property, its business and values.* These men who have furnished the labor, supplies and equipment to keep the road in operation and preserve its good will, business and

charter rights after insolvency and before the appointment of a Receiver, have a very strong equity in support of their claim for payment, in addition to the right to such payment as an aid to the preservation of the property at the time of, and subsequent to, the appointment of a Receiver. They have protected the property and preserved the rights from forfeiture at a time when they had a right to regard the company and its officers as *agents for the bondholders and their Trustee*. They really gave the credit for their services and supplies, after default and insolvency of the company, *to the property*, well knowing that these services and supplies were *indispensable* to the owners of the property, whoever they might be, in order to preserve the property, protect its franchises and perform the duty to the public due from the property and its proprietors. Judge Wellford, in the case of "Duncan and Calhoun, Trustees, vs. The Chesapeake & Ohio Railroad Company," before cited, has so clearly stated this superior equity of these claimants that we re-quote a few sentences from his opinion:

"These employes, of every grade and dignity, had "every right to believe that so long as the bondholders "stood aloof without asserting their rights to possession, "they were willing to accept and regard *pro tanto* as their "agents for the preservation and protection of the proper-"ty, the officers who, placed in charge thereof by their de-"faulting creditor, could not in good faith to the creditor "or debtor abandon their posts, or be derelict, while they "held them, to the trusts which they imposed.

"These bondholders are now in a Court of Equity seek-"ing satisfaction of their claims against the railroad company. "They have a right to be satisfied to the extent of an en-"tire forfeiture of all the proprietary rights of the company;

"but to concede to them, in enforcing such forfeit-
"ure, a right to repudiate all responsibility to satisfy these
"highly meritorious claims of employes, etc., out of the
"property or its future earnings, would be grossly incon-
"sistent with plain equity. In this forum they must be
"held to be estopped from denying the authority of the
"officers of the company under the circumstances, as
"agents for themselves as well as other parties in interest,
"to have incurred such liability."

The Chancellor, in determining how far back of the receivership he will require operating expenses to be paid, has then the right, in exercising his discretionary power, to take into consideration,

1. *The present conservation and future welfare of the trust.*

2. *The past preservation of the property, and its intangible values and rights.*

With these considerations in view we unhesitatingly affirm that no just Chancellor will fix a shorter period than that uniformly designated by His Honor, Judge Drummond, except in exceptional cases.

The Chancellor being vested with this discretionary power, this Court will not intermeddle with, or review, his action in the exercise of the power, unless plain and flagrant abuse of discretion is apparent upon the face of the record. It is a well settled principle that the exercise of discretionary power by a court properly vested with such power, will not be reviewed by an Appellate Court, unless abuse of discretion is shown by the record. The application of any different rule would divest the Chancellor — cognizant of all the circumstances surrounding the case, and the equities of the parties — of the discretion, and vest it in the Appellate

Court, far removed from the forum of the litigation and wholly unacquainted with the facts, circumstances and exigencies of the case. It would be difficult to find a case of appointment of a Receiver for a Railway, in which the adoption of the rule, uniformly adopted by Judge Drummond, requiring payment of operating expenses for six months prior to the appointment of the Receiver, could be shown to be abuse of discretion.

In the discussion thus far, the difference between a railroad mortgage and an ordinary real estate mortgage has been frequently noted. Upon this difference, and the different application of rules of law, and underlying equitable principles growing out of this difference, the soundness of the propositions already advanced, in no small degree rests. The briefs filed in the cause at bar upon the other side of this question, so far as we have seen, rest wholly upon the assumption that a railroad mortgage is only and solely an ordinary real estate mortgage, and is to be governed by the old rules of law applicable to ordinary house and farm mortgages. Resting upon this assumption of identity, the authorities cited by our opponents are the old authorities governing in ordinary real estate mortgages.

We do not propose to enter into any discussion of these authorities, or pick any quarrel with them, we simply say they are not authority applicable to this discussion because,

V.

A railroad trust-deed is not an ordinary real estate mortgage. It is a contract sui generis in its character, and cannot be measured by, or limited within, the old rules of law applicable to ordinary real estate mortgages.

The vast difference between these two classes of securities is instantly seen when we consider the *elements of value* sought to be covered by each.

In an ordinary house or farm mortgage, there is supposed to be *real* property of full marketable value. This *real property* is the whole basis of the lien.

What are the elements of value forming the basis of the lien of a railroad mortgage; what does it seek to cover?

1. *The Charter rights of the Company.* The right to exist as a corporation; the right to levy tolls; the right to exercise the right of eminent domain; all *intangible*, yet constituting by far the greatest *value* covered by the mortgage.

2. *Personal property:* Comparatively of little value when severed from use under the charter rights of the corporation.

3. *A little real estate:* Held only upon conditional title which reverts when the use under the charter rights ceases, and which, even if held by title absolute, would be of insignificant value if severed from the charter rights of the corporation.

4. *The good will and business of the Corporation:* Which are of course utterly valueless, and become extinct, whenever the use of the charter rights is suspended, or forfeited.

5. *It is a security based upon a public highway dependent upon the State for its right to exist:* An enterprise in which the general public and the State have rights and interests not to be ignored, *and subject to which rights and interest the mortgage is made.*

To attempt to adjust the legal and equitable rights of all the parties interested in property of this peculiar character by the application of the rules of law governing the fore-

closure of an ordinary real estate mortgage seems absurd and impracticable.

The similarity between a railroad mortgage and an ordinary real estate mortgage might well be said to begin and end in the name applied to the two instruments.

His Honor, Mr. Justice Harlan, presiding on Circuit at Chicago, recently held on full argument, Judges Drummond and Blodgett concurring, that the statutes of Illinois and Indiana regarding appraisement and redemption of property sold under foreclosure of an ordinary real estate mortgage, can not be applied to sales of railroad property under foreclosure of railroad mortgages.

The attempt to control the power of a railroad company whose line runs through two or three States, to purchase locomotives and cars upon conditional contracts—the vendor to retain the ownership until full payment is made—by the chattel mortgage law of Illinois, applicable only to personal property located in, and to be retained in, the county or township in which the lien is recorded is equally impracticable. The claim that the ownership of the conditional vendor of a locomotive or car, weekly, and may be daily, running hundreds of miles beyond the limits of the State of Illinois, scarcely ever remaining one hour within the jurisdictional limits of any one county or township of that State, shall be made to depend upon the recording of his contract of conditional sale in the office of some justice of the peace of some township of Illinois, according to the mode prescribed for recording chattel mortgages in that State, strikes us as verging upon the ridiculous.

But this is a digression from the point under consideration. We were led to make the suggestion because of the persistent attempt upon the part of our opponents

to confine railroad property, railroad mortgages and railroad contracts within the narrow limits of laws never intended to be applied to this class of property, and utterly impracticable of application to it. To return to the point under discussion, the difference between ordinary and railroad mortgages is well described by eminent counsel, Mr. R. H. Dana, jr., and the late Judge Curtis, in the case of Ellis vs. The Boston, Hartford & Erie Railroad Company, 107 Mass., 23, in this way:

"The indenture is not a mortgage or a pledge. It, as "well as the bonds, was executed and delivered upon cer- "tain terms, conditions and agreements precedent, the first "of which was that the corporation should have the pos- "session and control, the power to make usual contracts, "and, with the co-operation of the Trustees, the power of "sale. The corporation, therefore, was not in possession "and control as licensee or tenant of a mortgage, but "upon the fundamental condition precedent of the entire "indenture. The powers of the Trustees, when in pos- "session for foreclosure, are not derived from, measured "by, or analagous to, the powers of a mortgagee in pos- "session. They are to be drawn from and measured by "the instrument itself. One over-ruling general provision "is, that in respect to the operation of the road and the "collection of the income, they are to do as the corpora- "tion could do and ought to do. The true character of "the indenture is that it is a trust hypothecation by the "corporation, with elements of agency and representation "conferred by sanction of the State upon the Trustees "temporarily and conditionally; the two paramount "terms being, first: That the railroad business shall be "carried on in the usual manner as a public duty and a "private right by the corporation and, in a certain event, "by the Trustees; secondly, that so far as consistent with

"the first term, the debts of the prospective creditors "shall be paid."

It rests then upon different principles from a mortgage on a farm. In the case of an ordinary mortgage, there is real property of a full marketable value as the basis of a lien. That such is not the case with a railroad trust deed will readily appear from a few considerations.

The operating expenses of a railroad are of two kinds: First—The repairing of natural decay, such as painting bridges, replacing ties, rails, roofs and walls, buildings, clearing ditches, the wearing of rails, spikes, the repairs to machinery, draining, preventing the washing of embankments, and restoring them when washed; counteracting the constantly operating effects of water, frost, ice, and other natural elements. Second—Keeping the road running.

Both are necessary to the very existence of the property. That the repairing of natural decay is, is self-evident; that the operating of the railroad is, will appear, because it is necessary to maintain the title to the property, to maintain the corporate existence, to prevent the forfeiture of the charter for non user, to exercise the right of eminent domain granted to it by the State, to hold its rights of way, which, being conditioned, revert when the use ceases; to avoid being a public nuisance, as an unoperated railroad always is.

Operating is necessary to maintain the actual property. A railroad has no income, except from operating. It cannot, without income, replace or repair natural decay, or pay taxes, or maintain its organization, or employ its officers, clerks or agents, or look after its property. But it cannot be operated without credit. The wages of employes can

only be paid *after* being earned. And so with the rental of the rolling stock. They are amounts unknown until the service is performed. The same statement applies to amounts due connecting roads. And supplies must be had; and goods are to be received and examined and used all along the line; the accounts for them must be adjusted before they can be paid, and they are paid for out of what they earn — not before. This adjustment is ordinarily from four to six months in arrears. Cash payment is an impossibility.

All debts incurred for operating expenses are incurred for the benefit of the mortgaged property, for the benefit of the mortgagee. Hence the mortgaged property and the mortgagee are primarily responsible for them. Hence arises a superior equity. Hence an element comes in to postpone the railroad mortgage that is unknown in the case of an ordinary real estate mortgage.

Again: As has already been stated there is little *real* property in a railroad to serve as security for the mortgage. As we have seen, the thing itself can only be kept up in title and condition, by what it earns. A railroad mortgage is, in effect, a mortgage of its income. It has indeed a threefold value as a security for loans.

First: Its material value — its engines, cars, rails, ties, buildings, shops, land, etc., — everything that can be removed from its position on, in or as any part of the railroad, and be applied to the same purposes elsewhere, or to other purposes in its present position; in other words, all that can be sold and put to any use other than as a part of the road to which it belongs. It is evident that this material value represents a very limited proportion of the total value of a railroad; for, with the exception of the

rolling stock, the rails and shops, scarcely any part of the property named is applicable to any advantageous purpose except that for which it was designed in connection with the railroad. A large part of the cost of the rails consists of the expense of bringing them to the spot, fastening them together, bending them into shape, and spiking them to the ties. The ties are made costly by transportation, and are destroyed for almost every purpose by a single month's use. The depot buildings, the station houses along the line, the signal houses and signals, switches and gates are nearly valueless, except as connected with the road. The right of way and adjoining lands, and the fences — which is a very important item — are almost, if not totally worthless, except as used in connection with the road. Thus, the material value of a railroad represents but an infinitely small portion of its value as a security for a mortgage.

Second: Now, what is the next value? The charter value; the right to be a corporation; to levy tolls; to exercise the right of eminent domain, including what may be called the good will of the road, and its practical monopoly of certain forms and kinds of travel and trade. These rights, separated from the road itself, have a very limited value, but, in connection with the road, form a large part of its value. But they are acquired subject to a condition. They can be legally held only upon a condition, and that is a continuous operation of the road as a public highway for public convenience.

Third: So that there is another element of value as a security—its income value, consisting of a combination of its values, rights and properties in active operation for the purpose of earning income to preserve the title to and

existence of the other values; and the moment the railroad cease to be operated, that income value is nothing.

Thus is appears, First: That there can be no income until the property is preserved, or until *after* it is preserved. Second: That a railroad can not be preserved without operating it. Third: That there is no income until after the expenses of operating are paid. Fourth: That there is no income except *net* income to pledge as security—that is, what is left after deducting from gross receipts all expenditures necessary to secure, obtain and administer income, thus leaving the mortgage practically a lien upon *net* income only. And this is so whether the terms of the mortgage expressly cover income or not. It would seem, therefore, that ordinary analogies drawn from the theory and practice of mortgage law, as applied to real property (where the mortgage is not a lien upon either gross or net income, rents, or profits), are fallacious and inadequate, and must ultimately be abandoned.

This difference between these two kinds of mortgages will further appear if we consider that a mortgage without a right of foreclosure is, in no sense, a mortgage. A foreclosure, in equity and common law, implies a public sale, competition, a market; and this is the sole protection a mortgagor has. We submit that a genuine, competitive sale of a railroad is practically almost an impossibility, and has never taken place. Private persons do not buy, unless it is a combination of the bondholders in their own interest to save themselves. If there is any competition at all, it is limited to railroad companies, and generally to connecting roads.

The difficulties attending title are great. Litigation to

adjust disputes generally leaves an empty shell. The real capacity, condition and position of a road are known only to a few persons inside. A railroad can not be examined like a house. Its value depends, not upon what people can see of its material, but upon its net income, and that is always the measure of its value. Its good will, which is a great part of the value, can not be conveyed. Hence, competition is impossible, and foreclosure is a delusion. The statute books are full of laws for reorganization, acknowledging the impossibility of a contested foreclosure. Mortgagees universally ask judicial instruction in advance of the sale as to the lowest possible amount of money they will have to advance when they buy the road with their "pooled" bonds. A foreclosure and competitive sale, as under an ordinary real estate mortgage, is an impossibility, and is unknown.

From these considerations it seems clear that railroad trust deeds stand upon a peculiar footing; that they are widely different in every essential element of value, from ordinary real estate mortgages; that their main value as a security, depends upon conditions, characteristics and elements of value, entirely foreign to ordinary mortgages; and that these new conditions and dependencies utterly forbid the attempt to control, measure or limit them by the rules applicable to ordinary mortgages.

Bondholders buy their bonds secured by railroad trust deeds with full knowledge that these trust deeds are of necessity, subject to the legal and equitable results of these new conditions.

VI.

If the Chancellor at the time of the appointment of a Receiver, does make the appointment upon terms, requiring the payment out of the property, or its income, of back operating dues and expenses for a fixed period, and does embody these terms and conditions in the original order of appointment — or in subsequent orders, based upon the original understanding that terms and conditions were to be imposed — and if the then parties to the suit, and those thereafter becoming parties to the suit, accept the receivership, upon the terms and conditions imposed — acquiesce in the appointment, and consent to the terms and conditions required by the Chancellor, they cannot afterwards be permitted to question the right of the Chancellor to enforce performance of the terms and conditions imposed.

This proposition needs no array of authority in its support. It is self evident. Orders entered by consent of the parties in interest, and relative to a matter properly within the jurisdiction of the Court, become the law of that case. Accepting the advantages and benefits of an order of Court containing conditions, is a consent to the conditions.

In very many cases the order requiring the Receiver to pay back operating expenses for a given period, has been made by consent of the mortgagees. We understand such to have been the fact in the case at bar. In all such cases there can be no doubt about the right and duty of the Courts to *require full performance* of orders so made. To do otherwise would be to permit the mortgagees, by double dealing and deceit, to acquire all the benefit of the

order as an aid in the conservation of the property, and the preservation of its business, and value, without paying any equivalent therefor. Courts of Equity will hardly sanction such iniquity.

VII.

The absolute necessity, proved by the experience of the Courts to exist, requiring the payment of SOME *operating expenses due and owing at the time of the appointment of a Receiver, in order to preserve the property, its charter rights, its good will, its business — all its real value, constitutes a strong argument in favor of the power of the Chancellor to make such payments.*

Necessity and authority should be in harmony.

To attempt to show all the ways in which this necessity manifests itself, would be to undertake an endless task, but to demonstrate its existence is not difficult. It must be remembered,

1. That it is an absolute impossibility to operate a railroad without the use of *credit:* daily cash settlements with connecting lines, daily cash payment of operatives, cash in hand for supplies, and cash in advance for rental of equipment, are matters of impossibility.

2. The Court, upon taking possession of the property by appointment of a Receiver, is required to *preserve the property and its values* so far as possible: this is the very object of the receivership.

3. The property, and its most important values, cannot be preserved unless the road is kept in operation.

4. The operation of the road cannot be successful unless

an equipment is procured, and business relations are maintained with connecting lines.

5. The public and the State require the road to be kept in such repair and to be so operated as to give reasonable assurance of safety to life and property.

With these points in view, permit us to illustrate. Suppose a railway to begin near the west boundary line of the city of Indianapolis, over a mile from the Union Depot, with no right of way or track into the city, with no bridge across White river, wholly dependent upon the use of the track and bridge of another railroad to enable it to run its trains into the city and connect with other railroads; suppose for the use of this track and bridge it agrees to pay a rental of $2,000 per month; suppose its line runs from the beginning point above given to the town of Pekin, in the State of Illinois, not a railroad center where it can deliver its freight and passengers to connecting lines, but a small, unimportant town; suppose that to enable it to reach the city of Peoria and there form connection with various through lines reaching west and northwest, it procures the right to run its trains over the track of a road already built from Pekin to Peoria, a distance of some twelve miles, and agrees to pay for the use of this track a rental of $3,000 per month; suppose it had never owned a sufficient freight equipment, but depended wholly upon renting about 1,200 freight cars—over three-fourths of its whole freight equipment—at a monthly rental of about $30,000; suppose it had some five hundred men employed in its operation—skilled in their various duties, and thoroughly acquainted with the road and its business. Now suppose this road, with its rented terminal facilities, its hired

equipment and its army of operatives was doing a vast business and had become a well known "through line," making average yearly gross earnings of about one and one-half million dollars; suppose its business connections and freight and passenger interchanges reached from the eastern seaboard to the Pacific coast; suppose that in its zeal to *improve* and *extend* its line, and at the same time keep the interest paid on its bonds, it gradually runs behind in payment of its rentals, supply bills, balances due connecting lines and wages due operatives, keeping each in passable humor by partial payments, but gradually running behind, until it owes its operatives four or five month's back pay, and is behind in its car and track rentals eight to twelve months and for supplies and dues to connecting roads in like proportion. It has earned money enough to pay all these in full, but the earnings have gone *to the benefit of the bondholders*—partly in interest paid to them, partly in improvements made upon the property covered by their mortgage. Now suppose, in this condition of affairs, default in payment of interest occurs and suit is brought and appointment of a Receiver is asked. If the court in making the appointment should *refuse* to provide for *any part* of these back dues and operating expenses, could the Receiver, under such an order, *preserve the values of that property?*

What would be the result of such an order? If the Court refused to provide for payment of balances due connecting lines, those lines would *cease to connect*, and would form other combinations, thus destroying in a day the "good will" and business of the road as a link in a through line—an element of immense value. If the Court refused to provide for the payment of any part of the

rental due for the use of tracks and bridges and terminal facilities, the roads owning these facilities would prohibit their further use, thus striking another most fatal blow at the business of the road, and blotting out large values from it as a security. If the Court refused to allow any part of the large sum due for car rental, the cars would be withdrawn and rented elsewhere. This would be a most serious loss, because it would be no easy thing for the richest and strongest company in the country to suddenly procure, by purchase or rental, a thousand freight cars. For a Receiver, who should start out with a flat refusal to pay all past dues of his company, it would be an absolute impossibility to supply the place of the equipment so withdrawn in time to save the business and connections of his line.

If the Court should, in the appointment of a Receiver, refuse to provide for the payment of wages due operatives and employes, recklessness, engendered by the feeling that wrong and injustice had been done, insubordination and hostile revolt would soon deprive the road of its skilled and acquainted operatives, entail irreparable damage and loss upon the business and good will of the road, compel the employment of a new army of employes, ignorant of the road and unskilled in its business and needs, and subject the tangible property to imminent hazard. These would be the results of a refusal to make any provision for the payment of past due operating expenses. Could such a course be properly called *preservation of the property and its values?* On the other hand, suppose the Court, in the exercise of a wise discretion, should make an order requiring payment out of the property or its income of operating expenses for six months prior to the receivership.

This would cover all employes' wages in the supposed case, it would cover all rental for terminal facilities, all or nearly all dues to connecting lines, probably about one-half of the supply bills and one-half of the past due car rental, and what would be the result?

First: The skilled and accustomed operatives would continue the operation of the road and the management and building up of its business, without the loss of a single day's earnings.

Second: The terminal facilities, equipment, connections and interchanges with other lines, and general business good will, would be preserved and maintained unimpaired in value.

Third: The *credit* of the Receiver and his road would be maintained, enabling him to procure supplies without discrimination against him in price and terms.

Fourth: The hazard of injury to the tangible property would be very greatly reduced.

Fifth: The duty of the road to the public and the State would be performed, and charter rights preserved.

The *present* values preserved and losses averted would be cheap at the amount of payment required by such an order, while if the *future* welfare of the enterprise is taken into consideration, the economy and propriety of the expenditure become more strikingly apparent.

This would be conservation of the property in its truest sense, while at the same time it would be a just recognition of the equitable claim against the property in consideration

of its past conservation. Our supposed case is not a fancy sketch, it is based upon facts.

It is generally admitted that the Court has the right to pay back dues with *earnings* of the property while in the hands of the Receiver, but it is urged that the right does not exist to require such payments to be made out of the fund arising from the *sale of the property*. Our answer to this is, 1. When roads are put into the hands of a Receiver they are generally in a run down and dilapidated condition. The first duty of the Receiver is to put his road into safe repair and running condition, both as to its track and its equipment. For this purpose *all the income*—and oftentimes much more — is spent in repairing the road and its machinery, thereby adding to their value, and enhancing the security of the mortgagees. When this is done — when the fund that primarily should be used in payment of these back claims, is diverted from its proper course, and expended upon the property *for the benefit of the mortgagees, they* cannot be heard to complain if the Court requires the payment to be made out of the fund arising from sale of the property so benefited and enhanced in value.

2. There is in fact no such thing as a *sale* of a railroad, in the common meaning of that word. The mortgagees universally take it in on foreclosure. The foreclosure proceeding is only the method used to acquire possession. They know when a Receiver is appointed, that whenever forclosure is perfected they will take the property, and they know that every dollar put upon it by the Receiver in repairs and betterments, is a dollar of value added to the property that will ultimately come into their possession. It is therefore, disingenuous and fallacious to admit the right of the Court to apply the Receiver's earnings to the payment of dues

prior to the receivership, and deny the right to require payment out of the *property* when the Receiver's earnings have been expended upon the property and for its benefit.

The considerations submitted have led us to believe: That Courts of Equity possess discretionary power in the appointment of Receivers: That, in the exercise of the discretion vested in them, they may, in appointing Receivers of railways, impose terms and conditions: That they possess the power to require payment — out of the earnings of the roads while in the hands of their Receivers, or if the earnings are expended in repairs and betterments to the property, out of the fund arising from the sale of the property, — of necessary operating expenses, for such a period prior to the receivership, as they may believe, in the exercise of sound discretion, will best conserve all the interests of the trust, having in consideration the present and future preservation, and welfare of the property, and its past conservation: That the exercise of this discretionary power will not be reviewed by this Court unless abuse of discretion is apparent upon the record: That six months is not such a period as can be deemed an abuse of discretion: That consent to an order requiring such payments is absolute and binding upon the parties consenting: That practical experience has demonstrated the necessity of such payments: And that law, equity and good conscience fully support such payments.

The fact that we have not fortified our propositions with an array of ancient authorities, ought not to weigh against them. The subject is new. Railroad law is growing, and must grow with the resistless growth and expansion of railroad combinations and railroad commerce. New complications require new solutions. Many of the decisions

we have cited were rendered by *nisi prius* Courts, but we submit that the principles decided, and the reasoning in support of them, commend these decisions to careful consideration. It was judges sitting in *nisi prius* Courts who gave growth and body, strength and symmetry, to the magnificent system of the Common Law.

The sudden death of Hon. Samuel M. Harrington, late of Wilmington, Delaware, our able and learned associate in causes involving the question herein discussed, and who had undertaken, in behalf of our joint interest, to prepare this argument, has unexpectedly devolved its preparation upon us, in addition to other engrossing professional engagements. We desire to acknowledge the valuable aid we have derived from previous labors of Mr. Harrington in the causes in which we were associated.

With this brief we submit the opinion of Hon. Thomas Drummond, Judge of the Circuit Court of the United States for the Seventh Circuit, delivered in one of the causes in which we are interested. We feel assured that the reasons given by him in support of the discretionary power, the existence of which we have sought to establish, backed by his long and extensive practical experience and eminent ability as a jurist, will have the weight and receive the careful consideration to which their great merit entitles them.

Respectfully submitted,

McDONALD & BUTLER,

Solicitors.

INDIANAPOLIS, IND.,

October 21, 1878.

In 7 - 19. Wall 510. 8 Wall
William R. Fosdick and others. vs. Michael Schall.
In Supreme Court of the United States No. 631.

Sentinel Company, Printers, Indianapolis, Ind. [*October*, 1878.

IN THE

Circuit Court of the United States

FOR THE

District of Indiana and Southern District of Illinois.

MALCOLM C. TURNER, ET AL.,

vs.

THE INDIANAPOLIS, BLOOMINGTON AND WESTERN RAILWAY COMPANY, ET AL.

Opinion of HON. THOMAS DRUMMOND, *Judge U. S. C. C., Seventh Circuit, in support of discretionary power of Courts of Equity in the matter of Railway Receiverships.*

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OPINION.

DRUMMOND, J.

I will state some of the reasons which have caused the Court to adopt the practice which exists in this circuit, in relation to materials and supplies which have been furnished railways, and labor performed on them, when they are placed in the hands of receivers by the Court.

The question is important, because there have been within a few years numerous railways in this circuit operated by receivers, the annual income of which is many millions of dollars. It will be borne in mind that in all cases where a foreclosure has been sought by the bond holders, the mortgages provide that the after acquired property shall be bound by the mortgage, and it has been decided by the Supreme Court that such a contract overrides any judgment obtained against the railway company and execution issued, even as to

personal property coming into possession of the company before judgment and execution.

The railways do not come within the control of the Court until after default on the bonds or coupons, and generally after absolute insolvency. There are, therefore, when application is made to the Court for the appointment of a receiver, in all cases large balances due to operatives, and for supplies and materials furnished. There are also contracts running with other railways, upon which balances are due, and which contracts must often be continued in force in order to preserve the security of the mortgagees. The receiver takes the road with the benefits accruing from such contracts, and uses any supplies or materials which are on hand and not paid for. It therefore early became a question in this species of litigation what rule should be adopted by the Court as to such claims against the railway companies. A very simple way to dispose of the question was to take the railway at the time it came into the possession of the Court, pay for all work done and supplies furnished thereafter, and refuse to pay any debts so incurred before. But that seemed impracticable. It was not like an ordinary mortgage on a farm or a house. A railway is matter of public concern. It is one of the great instruments of modern commerce between states and nations. The public as well as private interests require its continual operation. To refuse to pay anything whatever for past services or supplies or materials has never, it is believed, been attempted by any court, or even demanded by any mortgagees. The receiver goes into the possession of the railroad with all its appliances and instrumentalities, with its men at work on the track or running the trains, with its coal, oil, tools and other means of operating the road. The mortgagees have come into court asking it to assume possession

of the road to protect their interests. Are the interests of all others, operatives and supply-men who happen to have claims against it at the time to be absolutely ignored in the case of insolvent companies?

The appointment of a receiver is, to a great extent, a matter of discretion in the Court, and it has been thought that it might require the receiver to pay certain of these claims, and even to hold the property subject to them; not as a lien on the road, but in the exercise of the equitable discretion of the Court in dealing with property which is of a peculiar character, and under circumstances of which the past history of litigation affords no example or precedent.

What should be included within the claims to be paid has also been the subject of consideration, and the practice has been to allow all to be paid that could be fairly regarded as a part of the actual operating expenses of the road, whether for labor or supplies, in their various forms. It being conceded that *some* claims for past services should be paid, the next point to be determined was, what limitation, if any, as to time should be placed upon such payment. It was found in many cases that those who had control of the railways, instead of paying the current operative expenses of the companies would postpone the payment of the same, sometimes for many months, in favor of the interest due on the mortgages, which they would discharge in the hope, apparently, that a more favorable time in the business of the roads would enable them to make up the deficiency. It was in view of this and similar considerations growing out of the actual condition of affairs, and of the absolute necessity of fixing some reasonable time within which such claims should be allowed, that the Court adopted, as by analogy, the rule of the Statute of Illinois, in relation to liens on railroads for work done, and

supplies and materials furnished. During the discussions which have taken place on this subject, the allowance of these "back" claims has been sometimes called a lien, but, in point of fact, it never has been or can be justly so considered, but, as already stated, as an exercise of the equitable power of the Court in the premises.

It is but fair to say, in the numerous cases which have come before the Court, its rulings upon this subject have been generally acquiesced in by the counsel of the mortgagees.

The magnitude of the claims in this case is such as perhaps to cause hesitation in following the rule which has been heretofore established, and makes it desirable to obtain from the Supreme Court a decision which shall announce some just principle that may be a guide in these and similar cases.

While it has been generally admitted that the Court had a discretionary power in the direction indicated, to disburse the earnings of the road, it has been insisted that these claims should not be considered binding on the property in case of foreclosure and sale.

The view that has been taken of that branch of the subject has been this: In general, when the mortgagees have come before the Court to ask for the appointment of a receiver, the property has been in a very dilapidated condition, the rails nearly worn out, the ties needing replacement, the rolling stock, station houses and bridges, repairs—the whole property being in a condition to render the transit of persons and of merchandise dangerous. The practice has therefore been, instead of immediately directing the receiver to pay for labor or supplies or materials furnished, to expend the receipts in repairs of the road, in the purchase of new iron or of steel, and of rolling stock, and in the construction and repair of side

tracks, bridges, station houses, etc., thus adding to the security of the mortgagees by enhancing the value of the property. It has been thought that under the same equitable discretion which has been heretofore referred to, this gave the operatives and material-men a just claim upon the property itself. It has not unfrequently happened that railroads which were comparatively worthless when they came into the possession of the Court, have become under its administration valuable property.

It is for these and other like reasons that the Court in the appointment of receivers in all cases of railroads in this circuit has required them, either at the time of such appointment, or as being so understood then, by subsequent order, to pay for labor performed, or supplies or materials furnished during the time indicated. The Court has always treated this kind of property as including in the security given to the mortgagees not only real and personal estate in the ordinary sense, but franchises and intangible property.

The experience of the Court which, it may be said, has been obtained by the management for many years of immense amounts of this kind of property, has satisfied it that practically, it would be well nigh impossible, looking at things as they actually exist, to operate the roads by receivers without some allowance for claims of the character mentioned, existing at the time of their appointment, and that the limitation already stated is not an unreasonable one, in view of all the circumstances.

Supreme Court of the United States.

WILLIAM R. FOSDICK
And Others
—vs.—
MICHAEL SCHALL,
Intervenor.

Chancery.

Appeal from Circuit Court of the United States for the Northern District of Illinois.

Argument against the Discretionary Power of Courts of Equity to require payment of Railway Operating Expenses incurred prior to the appointment of a Receiver.

BY

CHARLES M. OSBORN,

SOLICITOR.

SUPREME COURT OF THE UNITED STATES.

WILLIAM R. FOSDICK AND OTHERS
—vs.—
MICHAEL SCHALL, INTERVENOR. } CHANCERY.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

VARIOUS large interests for clients in analogous cases, one of which is now pending in this court, lead me to avail myself of the leave of the court to make the following suggestions.

The doctrine which I antagonize is: That, as a matter of discretion, and without the consent of the parties in interest, a court of equity, which is called upon to foreclose a railroad mortgage and appoint a receiver and manager, may, in preference to paying the mortgage indebtedness, appropriate the proceeds of the sale of the mortgaged property to the payment of the unsecured indebtedness of the railroad company existing when the receiver is appointed.

The only limitation which it is proposed to put upon this discretion, is that the indebtedness paid shall be that incurred for labor, supplies, rental of rolling stock, rental of other lines of road, railroad balances, or some other operating expenses incurred by the former management.

No limitation is proposed affecting the time when such indebtedness was incurred, but this is to be left to the discretion of the chancellor. The practice in the seventh circuit is not to pay such indebtedness if it was incurred more than six months prior to the appointment of the receiver. But this rule is purely arbitrary, and the discretion claimed extends to all such indebtedness, whenever it accrued. Other circuits could adopt, and probably have adopted, a different period of limitation.

If the discretion claimed were to appropriate to the purpose named only the net income of the mortgaged property while it remained in the receiver's possession, as was done in the case of Douglas *v.* Cline,[1] its exercise would be comparatively harmless. But the diversion of the proceeds of the *corpus* may, in many cases, amount to taking the greater part or the whole of the value of the property from the first mortgagees and giving it to those who confessedly had no lien upon it.

The leave under which I file this argument was (as I understand) given on account of the magnitude of the interests involved. It is said that millions of dollars are dependent on the principles to be settled in this case. It is evident that the amounts are likely to be very large, because they may include all the operating expenses of long lines of road for a period of six months, or even more. It is said that in the case in which his honor, Judge Drummond, wrote the opinion presented with the argument of the Hon. John M. Butler, the allowances under this six months rule will amount to nearly half a million of dollars. So the discretion which is claimed for the chancellor involves the absolute power to dispose of very large amounts of money.

In the exercise of such a discretion, no chancellor would inspire greater confidence than the eminent jurist who presides in this circuit. But the discretion claimed is one which every chancellor of every federal and state court might exercise. Each would determine, for each case which came before him, what portion of this indebtedness should be paid.

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[1] 12 Bush., 608.

Such a discretion would open the door to the imputation of corruption, which would tend to bring the judiciary into disrepute, and greatly lessen the confidence now felt in it by suitors. And I respectfully suggest that the people might well feel alarmed if the courts had the power not only to construe, but to make, the law for each particular cause.

In this circuit, the court, feeling the absolute necessity for uniformity of ruling, has deprived itself of the very discretion which is claimed for it, by establishing the period of six months as the limit, and extending the rule to every species of indebtedness which can be called operating expenses. Any just claim which accrued against the railroad company for operating expenses within six months prior to the appointment of the receiver, is allowed; but if the claim is for such expenses as accrued more than six months before the appointment of the receiver, it is not allowed.

Under this rule, any suspicion of partiality has been avoided. But this result has been obtained at an enormous expense to the mortgagees, and by the abandonment of the discretion which is urged as the authority for the allowance of any of the claims.

If the principle claimed is to prevail, it would be better that your honors should establish some uniform rule for all the federal courts, and that the state courts should conform to that rule. But by what right can your honors establish such a rule? Is it not clear that it would be making law — establishing rules of property, not rules of procedure?

The necessity for uniformity must be admitted, and yet if this court can determine the question of time, or even the character of the indebtedness to be allowed, so as to establish a uniform rule, the rule cannot exist, because its foundation is a discretion the exercise of which depends upon the facts of each case, and these facts cannot be anticipated by this court. The necessity for uniformity shows that the discretion claimed for the court is legislative, and not judicial, in its character.

The General Assembly of the State of Illinois has provided by law that certain indebtedness incurred for the operating of railroads shall be a lien upon the property of the railroad not covered by prior mortgage, if suit therefor shall be commenced within six months from the time the indebtedness accrued.[1] If this statute provided for a lien to take precedence of a mortgage made prior to its adoption, I should, with confidence, ask the court to hold it unconstitutional, because it would conflict with the tenth section of the first article of the constitution of the United States.

It is sought to produce this unconstitutional result through a judicial discretion, and, by the same means, to extend the operation of the statute so that the operatives' and supply men's liens may take precedence of the prior mortgage, in the face of the language and the admitted intent of the statute itself.

It has been claimed that the power of the chancellor to order the payment of past operating expenses, results from his discretion to appoint a receiver, or to refuse to appoint one, and it is said that, having the discretion to appoint or not, the chancellor may impose terms on the parties.

This statement of the chancellor's discretion is true; the fallacy lies in the attempted application of the principle. The discretion lodged in the chancellor is a legal discretion, not an arbitrary discretion; the end to be obtained by its exercise must govern the discretion itself.

The end sought by the appointment of a receiver is the preservation of the property and its income during the litigation, that it may be available to answer the final decree of the court upon the rights of the several parties to the suit — or whomsoever may prove title to it.

To attain this end, and to so guard his orders that injury shall be done to neither party, whatever may be the final result of the litigation, the chancellor has discretion as to the appointment of the receiver, and as to the terms upon which such appointment will be made or refused.

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[1] Revised Statutes of Illinois, 1874, p. 671, § 51.

If he guards against injury by requiring a bond of the complainant, or if he entrusts the management of the property to the defendant, upon its undertaking to account for the income, or such part of it as can properly be applied to the payment of the complainant's debt, no one will doubt but that these orders are a proper exercise of his discretion, and cannot be reviewed by this court. But if he requires the complainant to surrender to the defendant or to third persons a moiety of the valid debt which the suit is brought to recover, as a condition to granting relief as to the remaining moiety, or if he requires the defendant to pay double the amount of the indebtedness, as a condition for allowing him to keep possession of the property during the litigation, no one will doubt that he has gone beyond the limit of discretion, and has entered the domain of despotism.

In the case of Douglas *v.* Cline, *ubi supra*, the court places great stress upon the discretionary power lodged in the chancellor. But the dissenting opinion of Mr. Justice Cofer is a complete refutation of the argument of the majority; and I feel assured that the learned chancellor of this circuit would not ground his opinion on any such doctrine of arbitrary discretion.

These orders must be supported by some equitable right to the fund, taking precedence in law to the mortgage, or upon the ground of necessity, for the preservation of the property.

Eminent counsel, who have already filed arguments with the court, have cited and discussed all the more recent authorities and precedents. I have, therefore, almost entirely avoided even a reference to them. But, not having seen any discussion of English precedents on similar questions, I will review some of them which have come to my notice.

During the early part of the present century many cases involving the rights of the consignees of West India estates, came before the English courts.

The consignee was a mercantile house in England, to whom the principal part of the estate was shipped, and who furnished

and shipped supplies necessary for the working of the plantation; and the managers had substantially the same duties and rights as the consignee.[1]

The rights of these consignees were considered in reference to the income of the estate, and in relation to the *corpus*.

In some of these cases the consignee was appointed by the persons holding some title, in possession of the estate, and in some by a court having the estate in its charge, either for sale or to distribute the income.

It was at once recognized that the management of an estate in the West Indies was a species of trade rather than the ordinary management of landed property.

During the earlier portion of the century the estates were worked by slaves; when compensation was made by the government for these slaves, application was made by consignees (the estates having generally proved unprofitable) to be paid advances out of this compensation money.

In Marryatt *v.* Hooke,[2] the Lord Chancellor (Eldon) held that by the usage in the West Indies, a tenant for life having supplied the estate with necessaries, a lien subsisted after his death upon the inheritance.

In Scott *v.* Nesbitt (in A. D. 1808), the attention of Lord Eldon was called to the fact that no such lien existed by the colonial law. His Lordship apparently held that, so far as the circumstances of the title and the dealing of the parties with the estate permitted, the consignee's claims against the estate, incurred for the benefit of those who are to take it, would be allowed (p. 446), but as is said in Frazier *v.* Burgess, owing to the imperfect report of the case, it is difficult to draw any satisfactory conclusions from it.

It will be observed, however, that the question related to the claim of a tenant in common of the estate, for supplies furnished by a consignee for the whole estate, and paid for by the tenant

[1] Frazier *v.* Burgess, *post.*

[2] Unreported. See Scott *v.* Nesbitt, 14 Ves., 442.

in common, and this right of a tenant in common in the stock of a trading partnership seems to have been an important element in the decision.[1] It will further be observed that the court seems only to have required allowances to be made in the accounts of the consignee, not out of the *corpus;* and that the real opposing interests held only a charge on the estate, which was not a mortgage, or an estate of any kind.

In Shaw *v.* Simpson[2] (in 1842) the case of Scott *v.* Nesbitt was explained so as to shake its authority, if it was authority, on the point of the claims being a lien on the *corpus.*[3]

In Morrison *v.* Morrison,[4] in 1854, Sir J. Stuart, Vice Chancellor, held that the advances of the consignee were a lien upon the estate having a priority to a mortgage previously executed; but there were special circumstances in the case which may have greatly affected the decision. For instance, the assignee of the mortgage held in trust for one of the consignees, who claimed a lien for his advances as consignee, in priority to his own mortgage; and great stress is laid on laches and acquiescence in the holding of the consignees, and also as to the passing of their accounts before the court by whom the consignee was appointed, and the money being derived from the source whence it was, viz., the compensation for slaves, may have been an important element in this decision.[5]

The case was not appealed by the mortgagee, but was by the holder of the equity of redemption, and was decided on grounds which left the rights of the mortgagee out of the question.

Turner, Lord J., expressly reserving the question of a lien by the consignee on the *corpus;* upon which subject he said he had never made up his mind.[6]

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[1] Farquaharson *v.* Balfour, 8 Sim., 212; Frazier *v.* Burgess (*post*).

[2] 1 Young & Collyer, 732.

[3] See, also, Frazier *v.* Burgess, *post.*

[4] 2 Sma. & Giff., 564; s. c. 1 Jurist, N. S., 339.

[5] Frazier *v.* Burgess, *post.*

[6] Morrison *v.* Morrison, 7 De G. Mac. & Gor., 214; s. c. 1 Jurist (N. S.) 1100.

In 1852, before the decision of Morrison *v.* Morrison, the Lord Chancellor (Lord St. Leonard) in the matter of Thorp, a lunatic,[1] had intimated that the consignee's lien extended to the whole life estate of the lunatic, but not to the estates of remainder-men in the same property.

After the decision in Morrison *v.* Morrison, the case of Frazier *v.* Burgess[2] was decided. It was there held that when the possession has been held by the attorney and manager of the mortgagor, if the mortgagees have so recognized the possession of the manager, that he can be considered as acting on their behalf, and for their benefit, the manager has the same right to be reimbursed his advances that a trustee in possession for the benefit of all parties would have. But the court expressly repudiates the idea that the manager appointed by the owner would have a lien for such advances against those whose title is prior to that of his employer, and who have nothing to do with the expenditure.

This case was followed, in 1862, by the case of Bertrand *v.* Davis,[3] where Sir John Romley, Master of the Rolls, held that the manager of a West India estate, appointed by the tenant for life, had a lien against the remainder-man for the supplies which produced the first crop taken by the remainder-man, but no further lien; and that a mortgagee allowing his mortgagor to manage the estate and receive the produce of it without interference on his part, is not bound or affected by the previous management. "He cannot require an account of past profits or past produce, and in like manner he cannot be injured by any of the costs of management which have been incurred subsequently to the date of his mortgage." That he may take possession of the estate at any period he may think fit, and after he has done so the account will be taken against him, but not before.

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[1] 2 Sma. & Giff., p. 578.

[2] 13 Moore, P. C. C., p. 314.

[3] 31 Beavan, p. 429.

In this review I have attempted to mention such of the cases as were necessary to show the adjudication of the English courts of chancery on the point. There are others which were decided upon implied consent of parties, upon actual contract, and on questions of practice, to which I have not thought it necessary to refer. Owing to what is supposed to have been a misconception of the opinion of Lord Eldon, in Scott *v.* Nesbitt, it was attempted to establish a rule of right, which has been entirely rejected by the more recent decisions of the court.

The rule now in force in that court is, without doubt, similar to the rule for which I contend in the case at bar, and the questions involved in those cases and in the case at bar, seem to me to be very similar in principle.

The right of the claimants to the fund in court does not depend upon the justice of their claims against the railroad company, but upon their legal *status* as to the property upon which the mortgage is a lien.

It is not claimed that they have a prior lien, or indeed any lien upon this property, nor is it claimed that they have any lien upon the income of the property while it is in the possession of the receiver, and I find it difficult to define or to determine the nature of the right claimed for them.

It is said that the interests of the public require that railroads should be operated, and that in their operation an indebtedness is necessarily incurred. That in taking possession of the mortgaged property it is necessary to take all the supplies on hand, and it is customary to take the revenue already earned. That these employes and supply-men are entitled to this revenue, and perhaps to the value of these supplies, and therefore this prior indebtedness should be paid out of the income of the road while in the hands of the receiver, and, if need be, out of the property itself, in preference to any other indebtedness incurred for other purposes, though secured on the income and property.

I cannot deduce this conclusion from the premises.

If the receiver takes property not mortgaged, such property, or its value, should be accounted for to whomsoever shows title to it, and to that extent such claims might be paid under the statutory right above stated. But the taking of such property can constitute no reason for requiring the fund to pay anything more than the value of the property taken which is not covered by the lien of the mortgage. The proceeds of the mortgaged property to the amount of the mortgage debt belongs to the mortgagee.

The operatives and supply-men are simple contract creditors. They entered into their contracts in full view of the prior lien of the mortgage on the *corpus* and on the income earned after the mortgagee or his receiver has taken possession. They have trusted the management to appropriate the current income of the road to the payment of the amounts due to them.

The managers have misappropriated this fund, or have used it to pay indebtedness which was entitled to no priority. They have not appropriated it to the payment of the interest due on the mortgage debt; if they had, there would have been no occasion for the appointment of a receiver. They have not appropriated it to the repair of the property, for (as is said in the opinion of his honor, the Circuit Judge, before mentioned) the roads, when they come into the receiver's possession, are generally very much out of repair; and they have not appropriated it to the payment of operating expenses.

The question is, upon whom this loss, caused by the managers' improper conduct, should fall? Shall it fall upon those who trusted the management, or upon those who did not trust them, but required and had security for their debts, and have not been benefited by the failure of the management to do their duty?

By reason of the small amounts due to each, operatives and some classes of supply-men are not so well able to protect themselves as are capitalists who invest large amounts, with the expectation of large profits. The former class are, for this reason, entitled to more liberal laws for their protection than the latter. And this principle is generally recognized by the legislature.

But it is a consideration which addresses itself solely to the legislative department.

Before the courts all men are equal. Courts must enforce the law as they find it, and they have no more right to make law for the operatives than they have to make law for the capitalists.

To induce the capitalists to invest money in the very work which gives these operatives employment, the legislature found it necessary to legalize liens upon the property produced by this capital, and on its income, and thus secure a return of the investment. This contract the courts are bound, by every principle of policy, of honesty, and of law, to enforce. To refuse to do so would disrupt the very bonds of our social system.

By providing for a lien on all the property of the railroad company which is not covered by a prior mortgage, the legislature has provided for the security of these operatives and supply men, as far as it was practicable to do so.

These claimants have neglected to enforce this right until it is now too late, because the property upon which they had a lien has been dissipated. But there is no justice in requiring the mortgagee, who took no part in its dissipation, and had no benefit from it, to make good this loss out of his own property.

If such a practice is established, the inevitable result will be still greater negligence on the part of employes and supply men in the enforcement of their rights against the income, because they will feel themselves secure in any event, and the managers will have full scope to appropriate the income to improper purposes. The managers may use the receipts to pay dividends on stock held by themselves at the expense of the mortgagees, or they may pay the interest of the mortgage out of the principal due upon it, and so, by the destruction of the security, prevent the mortgagee obtaining possession under the mortgage.

In what, if any, respect the fact that railroad companies have public duties to perform, affects the legal relation of the creditors to each other, I am at a loss to perceive; certainly the legislative power has made no distinction between the rights of a

mortgagee of railway property and the rights of a mortgagee of ordinary property, as against those creditors who have no lien, and the legislature is the proper guardian of such public interests.

It is truly said that the interest of the public require that whoever chances to be in possession of the property of a railroad shall operate it.

These general railroad mortgages cannot be treated as a mortgage of so much land, so much iron, and so many cars and locomotives; but must be treated as mortgages of the entire "plant," to be sold and operated as one entire thing; and the legislature, in giving the power to mortgage, intended that it should be so treated.

By executing this legislative intent the courts will best subserve the interests of the mortgagees, for the property would be worthless except as an entirety. But the distinction which exists between these two classes of mortgages is only such as necessarily arises from the different classes of property.

The legislative authority has given no new species of discretion to the courts, and has not authorized a distinction as to the relative rights of creditors. It seems to have considered the interests of the parties in the possession of the property as the best of all guarantees for the continued performance of the public duties which it imposed.

And the books show that, in practice, the mortgagees are ever ready to consent to anything which is really necessary to preserve the property and keep it a "going concern."

It is argued that in the management of railroad property there is a necessity for some credit in favor of operatives, because, in practice, such expenses cannot be paid in advance, or from day to day. That if the employes are not reasonably assured of their wages, they will not work, and so the public duties of the railroad company will not be performed.

It would be well for the whole country, if, whenever the managers of a railroad cease to pay their operatives and divert its

current receipts to improper purposes, the operatives would cease to work, and in that way compel the selection of new managers whom the operatives could trust to properly apply the current receipts.

The effect of such action would not be to prevent roads from being operated, but it would be to compel an honest administration of the current revenue derived from the railroad property.

The real argument in support of the six months rule which is to be deduced from the necessities of the case is still to be considered, and it requires careful consideration.

It is said that arrearages of wages exist in almost every case where a railroad goes into the hands of a receiver. That if provision is not made for the payment of these arrearages, the operatives will use force to prevent the receiver taking possession, or will so negligently and improperly perform their duties, as to endanger life and property and render the attempt of the receiver to preserve the property abortive.

It must be admitted (humiliating as it may seem) that there are likely to be many cases where the courts will be practically powerless to enforce their orders and to preserve the property, if the earned wages of these operatives are entirely cut off.

What shall the court do in such cases?

There is, also, a species of cruelty in taking the bread from the mouths of men dependent on their daily labor for the support of themselves and their families, which few courts, solicitors, or suitors, are willing to inflict, even if the legal right is clear.

This seems to me the real reason which has led to the adoption of the rule, and that all other reasons have been forced, in the attempt to justify and render consistent the action which was dictated by humanity as well as necessity.

It is clear that no court ought to, and I do not know that any court has ever refused to, grant an order, to which the parties were otherwise entitled, because it was feared that the execution

of the order might be resisted by force; this consideration may operate on the parties in applying for the order, but not on the court to which the application is made.

In practice, the court will seldom or never be called upon to enforce an order cutting off such meritorious claims.

In all cases where the property is insufficient to pay the mortgage debt, and the defendant company is insolvent, and, therefore, the necessity of a receivership exists, the mortgagees are, more than any one else, interested in the preservation of the property, and in the successful conduct of the business by the receiver; because the property is their only security, it is necessary that it should be sold as a "going concern," and all losses by the receiver are, in effect, paid by them.

The bondholders may be safely trusted to give consent to proper allowances being made to employes. Whatever might be the effect of an appeal to their humanity, the appeal to their interests is irresistible. Parties will not ask the court for orders which cannot be enforced, and which will endanger the whole security.

With the exception of the Kentucky case above mentioned, I think that no objection has ever been made to a reasonable allowance to the operatives, at least no such record appears among the cases in this court.

His honor, the Circuit Judge, in the opinion before the court, says that, "To refuse to pay anything whatever for past services, or supplies, or material, was never, it is believed, been attempted by any court, *or even demanded by any mortgagees.*"

It is not probable that any of the counsel who appear before your honors against the six months rule, would be here if the question of the payment of employe's wages was the one really involved.

The real cause of complaint is that the court, in the attempt to justify, on principle, the orders really entered by consent, has extended the practice of allowing claims far beyond the necessities of the case or the calls of humanity; to the payment of railroad balances, on the ground that connecting lines could greatly

embarrass the operation of the property while in the hands of the receiver; to the payment of supply bills where neither the argument of necessity or humanity could obtain; and to the payment of large amounts to the lessors of rolling stock, and locomotives, and perhaps of other lines of road, even when it is charged that the original contracts were at ruinous rates, and were the principal cause of the insolvency of the railroad company.

If the discretion exists on the ground of necessity to pay any claims, it should extend only so far as the necessity dictates. No necessity can exist for the payment of supply bills, or the rentals of rolling stock or other roads.

It may be politic to pay these claims, but it will scarcely be contended that the court has the discretion to give away my property against my consent, because it shall believe that it would be politic for me to do so.

I respectfully submit that the question of the payment of any of these several classes of claims out of the mortgaged property, or the mortgaged income, is a matter of policy and not a matter of right, or of necessity, in the proper sense of that word. That, as a matter of policy, it addresses itself to the parties in interest, and not to the court; and that the court has no power to decide the question against the legal right.

Respectfully submitted,

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